FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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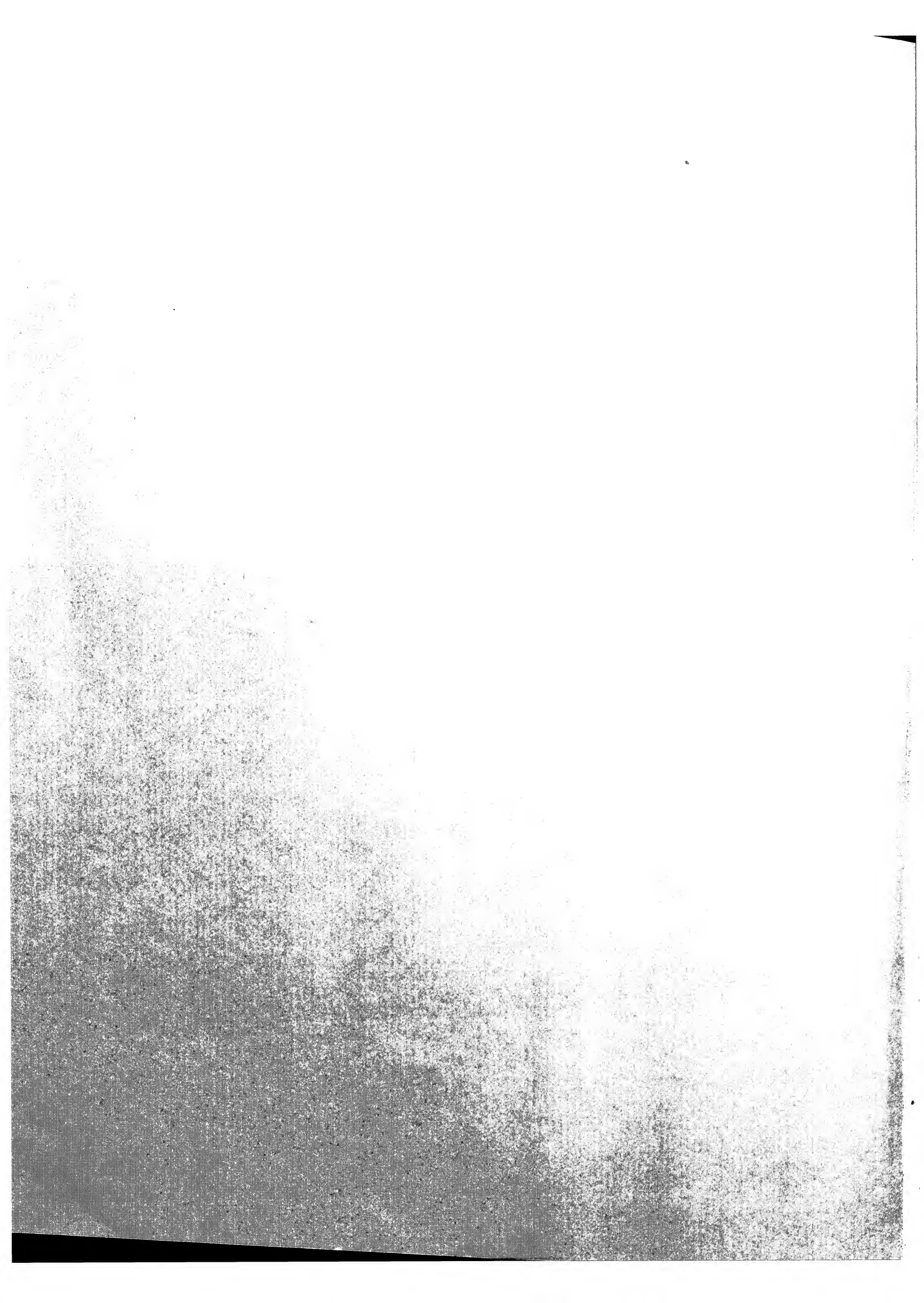
DECISIONS



DECEMBER 1986

COMMISSION DECISIONS

ADMINISTRATIVE LAW JUDGE DECISIONS

DECEMBER 1986

Review was granted in the following cases during the month of December:

Secretary of Labor, MSHA v. Austin Power, Incorporated, Docket No. CENT 86-40, etc. (Judge Koutras, November 10, 1986)

Secretary of Labor, MSHA v. Kelley Trucking Company, Docket No. CENT 85-109. (Judge Merlin, Default Decision, July 21, 1986)

Review was denied in the following cases during the month of December:

Secretary of Labor for Yale Hennessee v. Alamo Cement Company, Docket No. CENT 86-151-DM. (Judge Koutras, Petition for Interlocutory Review of November 6, 1986 Order)

Secretary of Labor for Michael Hogan & Robert Ventura & UMWA v. Emerald Mines Corporation, Docket No. PENN 83-141-D. (Judge Koutras, November 7, 1986.)

Leo Klimczak v. Ceneral Crushed Stone, Docket No. YORK 82-21-DM. (Judge Melick, April 6, 1983)

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 16, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JAMES CORBIN, ROBERT CORBIN, and A. C. TAYLOR	:	
v.	:	Docket No. KENT 84-255-D
SUGARTREE CORPORATION, TERCO, INC., and RANDAL LAWSON	:	

BEFORE: Chairman Ford; Backley, Doyle, and Lastowka, Commissioners

ORDER

BY: Chairman Ford; Backley and Doyle, Commissioners

In connection with a Motion for Immediate Reinstatement, also ruled on today, the Secretary of Labor has filed a Motion to Direct the Payment of Sums into Escrow or, in the Alternative, to Direct Posting of a Bond as Security. Respondent Terco, Inc., has filed an opposition to the motion.

The Secretary has not made a clear showing that this form of relief is necessary. Accordingly, the Secretary's motion is denied. The Commission, however, will expedite its review process in this matter.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

Commissioner Lastowka, dissenting:

The Secretary of Labor's motion should be granted. The administrative law judge has determined after a full hearing that complainants were unlawfully discharged. The Secretary does not seek immediate payment to the miners themselves of the damages awarded by the judge. Rather, the Secretary desires only to have the operator post sufficient security to ensure payment of the damages in the event that the operator's appeal is unsuccessful. Certainly, the Commission is empowered to afford the requested relief. 30 U.S.C. § 815(c)(3). Cf. Metric Constructors, FMSHRC Docket No. SE 80-31-DM (Order of August 21, 1984); see Fed. R. App. P. 7. The exercise of this authority is especially appropriate where one of the respondents ceased operations shortly after the Secretary's institution of these discrimination proceedings and the major issue before the Commission concerns the question of successorship.

In weighing the relative interests of the complainants and the operator in this particular matter, I can discern no persuasive reason why the interim security sought by the Secretary should not be provided. Accordingly, I dissent from the denial of the Secretary's motion.

James A. Lastowka, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 8, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of YALE E. HENNESSEE	:	
v.	:	Docket No. CENT 86-151-DM
ALAMO CEMENT COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), we review for the first time a Commission administrative law judge's order of temporary reinstatement under revised Commission Procedural Rule 44, 29 C.F.R. § 2700.44 (1986)(51 Fed. Reg. 16022 (April 1986)). For the reasons that follow, we affirm the judge's order.

On April 22, 1986, complainant Yale E. Hennessee was discharged by Alamo Cement Company ("Alamo") for alleged insubordination during the course of a work refusal incident. The next day Hennessee filed a complaint with the Secretary of Labor pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), asserting that Alamo had discharged him unlawfully because he had refused to complete an assigned task under unsafe conditions. On September 10, 1986, after commencing the required investigation of the complaint and determining that it was not brought frivolously, the Secretary filed an application with this independent Commission for the temporary reinstatement of Hennessee. 30 U.S.C. § 815(c)(2). Alamo filed a request for a hearing on the application pursuant to 29 C.F.R. § 2700.44(a)(1986). On October 23, 1986, a hearing was held before Commission Administrative Law Judge George A. Koutras.

Following the hearing, Judge Koutras issued an order on November 6, 1986, directing Alamo to temporarily reinstate Hennessee. The judge found that a "viable issue" was raised as to whether Hennessee's work refusal, which preceded his discharge, was based in part on his reasonable, good faith belief that performing the task in question was hazardous. Accordingly, the judge concluded that Hennessee's complaint was not frivolous. On November 14, 1986, pursuant to 29 C.F.R. § 2700.44(e) (1986), Alamo filed with the Commission a petition for review of the judge's order. The Secretary has filed a brief in opposition.

We have reviewed carefully the evidence, pleadings, and briefs, and conclude that the judge's order is supported by the record. The scope of a temporary reinstatement hearing is limited to a determination by the judge as to whether the miner's discrimination complaint is frivolously brought. 30 U.S.C. § 815(c)(2); 29 C.F.R. § 2700.44(c)(1986). The judge appropriately found that the testimony and other evidence, including certain evidence introduced by Alamo itself, raises a non-frivolous issue as to whether Hennessee's discharge was in violation of the Mine Act. We also find that the hearing afforded Alamo due process. As relevant here, the essence of due process is the opportunity to be heard. E.g., Boddie v. Connecticut, 401 U.S. 371, 378 (1971); Hodel v. Virginia Surface Mining & Recl. Assn., 452 U.S. 264, 299-300 (1981). Alamo has been heard in a pre-deprivation hearing, in which it was allowed to present witnesses and evidence and to cross-examine the government's witnesses. Cf. Southern Ohio Coal Co. v. Donovan, 774 F.2d 693 (6th Cir. 1985), reh'g denied, 781 F.2d 57 (1986).

No view is intimated herein as to the ultimate merits of this case. The only issue that has been decided is that Hennessee's complaint was not frivolously brought. Alamo's request for a stay is denied, and the judge's order is affirmed. This matter is remanded to the judge. Further proceedings, on the part of all concerned, are to be conducted expeditiously. See Secretary on behalf of Donald R. Hale v. 4-A Coal Co., Inc., 8 FMSHRC 905, 907-08 (June 1986).

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
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December 19, 1986

GARRY GOFF :
:
v. : Docket No. LAKE 84-86-D
:
YOUGHIOGHENY & OHIO COAL COMPANY :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

BY THE COMMISSION:

This proceeding concerns a discrimination complaint filed by Garry Goff pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982)(the "Act"). Following a previous determination by the Commission that Goff's complaint stated a cause of action under section 105(c)(1) of the Act, the matter was remanded to Commission Administrative Law Judge Melick. The purpose of the remand was to determine whether Goff was discriminatorily discharged by the Youghiogheny and Ohio Coal Company ("Y&O") because he was "the subject of medical evaluation and potential transfer" under the standards set forth in 30 C.F.R. Part 90. 1/ 7 FMSHRC 1776 (November 1985). On remand, the judge examined that issue and found that Goff was not discharged in violation of section 105(c)(1). 2/ 8 FMSHRC 741 (May 1986)(ALJ). The Commission granted Goff's petition for discretionary review. For the reasons that follow, we affirm.

1/ Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air ("mg/m^3").

2/ Section 105(c)(1) of the Act provides in part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... in any coal or other mine ... because such miner ... is the subject of medical evaluations and potential transfer under a standard published pursuant to section [101] of this [Act]....

30 U.S.C. § 815(c)(1).

This proceeding began when Goff filed a complaint of discrimination with the Department of Labor's Mine Safety and Health Administration ("MSHA"). Following investigation of the complaint, MSHA determined that a violation of section 105(c)(1) of the Act had not occurred. Goff then filed a complaint in his own behalf with this independent Commission alleging that his discharge violated the Act. Y&O moved to dismiss the complaint for failure to state a cause of action. The administrative law judge concluded that Goff's complaint was based on an allegation that Goff was discriminated against because he suffers from Black Lung (pneumoconiosis) and that such a complaint could be resolved only under section 428 of the Black Lung Benefits Act, 30 U.S.C. § 901 et seq. (1982)("BLBA"). Therefore, the judge granted the motion to dismiss. 6 FMSHRC 2055 (August 1984). On review, we reversed the judge's decision, holding that a miner may state a cause of action under section 105(c)(1) of the Mine Act by alleging discrimination based upon the miner being "the subject of medical evaluations and potential transfer" under Part 90 and remanded the proceeding to the judge to determine whether Goff had been discharged unlawfully.

Our task on review is to determine whether the judge properly concluded that Goff was not discriminatorily discharged in violation of section 105(c)(1) of the Act. A number of collateral issues were raised by the complainant which lie outside the scope of our review and which we do not address; for example, whether Goff in fact had pneumoconiosis, which of the various doctors seen by Goff correctly diagnosed his medical condition, and whether Y&O's leave policies were reasonable. Further, our review in no way addresses any separate remedy Goff may be seeking under section 428 of the BLBA. 30 U.S.C. § 938. 3/

I.

Goff worked as a supervisory foreman for Y&O from September 1976 until January 20, 1984. In August 1982, while employed at Y&O's Allison Mine, Goff's doctor diagnosed him as having pneumoconiosis and Goff thereafter was assigned to work primarily outside the mine. In October 1983, Goff again was diagnosed by his doctor as having pneumoconiosis.

3/ The BLBA is administered by the Employment Standards Administration ("ESA") of the Department of Labor. The Department of Labor is charged with the duty under both the Mine Act and the BLBA to investigate pneumoconiosis-related discrimination complaints. Accordingly, the Department's MSHA and its ESA have entered into a Memorandum of Understanding ("MOU") to coordinate their investigations and to clarify their jurisdiction and procedures. 44 Fed. Reg. 75952 (Dec. 21, 1979).

Under the MOU, ESA makes the determination as to whether a violation of section 428 of the BLBA has occurred and MSHA makes a determination whether a violation of section 105(c) of the Mine Act has occurred. If the aggrieved person proceeds with complaints under both sections, MSHA proceeds first with the section 105(c) complaint and ESA may then proceed with the section 428 complaint. The MOU reflects that the two sections may provide different remedies.

return to work the next day, he would be discharged. 6/ Goff testified that he told Weber and Wurschum that he would be unable to work until his doctor authorized his return. Goff did not report to work on January 20, 1984. On January 21, he received a letter from Y&O dated the previous day informing him that he was discharged for failing to report to work. The letter stated that Goff's "allegation of not being able to work has not been documented by medical certification" and noted that the results of Goff's medical examination on January 13 did not indicate any reason that would prevent Goff from working underground. On January 30, 1984, Goff took a medical release dated January 24, 1984, to Weber, who indicated that Y&O was not hiring.

On July 2, 1984, Goff received a letter from MSHA stating that based on the chest x-ray reports he had sent to MSHA on January 14, pneumoconiosis was indicated and he was eligible under Part 90 to work in an area of the mine with an average concentration of respirable dust at or below 1.0 mg/m^3 of air. On August 8, 1984, however, Goff was further advised by MSHA that because he no longer was employed at an underground coal mine, Part 90 status was not applicable to him.

II.

In concluding that Y&O did not discharge Goff unlawfully, the judge noted that for Goff to establish a violation of section 105(c)(1), Goff had to prove that he engaged in protected activity and that his discharge was motivated in any part by the protected activity. 8 FMSHRC at 743. (Citing to Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2799 (October 1980), rev'd on other grounds sub. nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981).) With respect to the motivational issue, the judge indicated that there was no evidence that any Y&O personnel knew, prior to Goff's discharge, that he had filed a Part 90 application. 8 FMSHRC at 743-44. In addition, the judge concluded that Y&O officials could reasonably have given greater weight to the medical evidence they obtained from the Wheeling Park Hospital medical evaluation of Goff, which indicated that Goff did not have pneumoconiosis and was capable of working. 8 FMSHRC at 744.

6/ Dr. Elliott stated in his medical report:

> Chest x-ray was within normal limits. No evidence of pneumoconiosis was seen.
>
> There was no evidence of any significant respiratory or pulmonary disease physiologically.
>
> I find no medical reason at this time that would prevent Mr. Goff from being able to work underground as a supervisor.

8 FMSHRC at 742-43.

Finally, the judge found that even if Y&O had known that Goff applied for Part 90 status, Y&O would not have been motivated to discharge him on that basis because Part 90 status would not have affected Goff's work assignment as a labor foreman. 8 FMSHRC at 744. Under Part 90, a qualifying miner is entitled only to transfer to a dust reduced area where concentrations of respirable dust are at or below 1.0 mg/m^3 of air, and the judge noted that Wurschum believed the dust concentrations in the entire Nelms Mine were less than 1.0 mg/m^3 of air. The judge further noted that in 1984 the average respirable dust concentration in the outby areas of the mine, where Goff ordinarily would have worked, was 0.55 mg/m^3 of air and that even near the face the average concentration was less than 1.0 mg/m^3 of air. 8 FMSHRC at 244. The judge concluded that Goff had "failed in his burden of proving that Y&O was motivated in any part in discharging him because he was 'the subject of medical evaluation and potential transfer' under Part 90." 8 FMSHRC at 745.

III.

For the reasons that follow, we affirm the judge's conclusion that Goff's discharge did not violate the Act. A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983)(specifically approving the Commission's Pasula-Robinette test).

The medical examinations and procedures to which Goff was subjected in this case were intended to determine whether he suffered from pneumoconiosis, an initial step in obtaining Part 90 status, and as such, were protected activities. Further, Goff engaged in protected activity in applying to MSHA for a determination of his eligibility for Part 90 status. Like the medical evaluations, the application process is a necessary preliminary step and comes within the statutory protection afforded miners who are the "subject of medical evaluations and potential transfer" under Part 90.

We conclude, however, that although these events constituted protected activities, Goff did not establish that Y&O was motivated in any part by knowledge of such protected activities.

Direct evidence of actual discriminatory motive is rare. Short of such evidence, illegal motive may be established if the facts support a reasonable inference of discriminatory intent. Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508, 2510-11 (November 1981), rev'd on other grounds sub. nom. Donovan v. Phelps Dodge Corp., 709

F.2d 51 (D.C. Cir. 1983); Sammons v. Mine Services Co., 6 FMSHRC 1391, 1398-99 (June 1984). The present record contains no direct evidence that Y&O was illegally motivated, nor does it support a reasonable inference of discriminatory intent.

In examining the record for instances in which discriminatory intent could be inferred, we note that, with respect to Goff's medical evaluations of August 1982 and October 1983, Y&O did not discharge Goff because of these evaluations. To the contrary, the record indicates that Y&O accommodated Goff by assigning him work primarily on the surface. Not until the Allison Mine closed in early January 1984, approximately a year and a half after Goff's first diagnosis of pneumoconiosis, was he transferred to underground work. 7/

Similarly, no inference of discriminatory intent can be inferred from Y&O's response to Goff's medical evaluation of January 1984. Substantial evidence supports the judge's conclusion that Y&O reasonably relied upon Wheeling Park Hospital's January 1984 evaluation of Goff which, based upon specific medical tests and x-rays, indicated that Goff was fit to return to work.

With respect to Goff's Part 90 application, we affirm the judge's finding that Y&O did not know prior to his discharge that Goff had filed a Part 90 application. There is no evidence that Goff told supervisory personnel at Y&O that he had applied or was going to apply for Part 90 status. Goff states that he told mine manager Wurschum on January 1984, that he wanted to take one or two days off to "get x-rays taken" to settle the situation concerning his pneumoconiosis. Goff Dep. 58, Tr. 188. According to Wurschum, Goff asked only whether he was going to be allowed to take some days off and Goff said nothing about having x-rays taken or applying for Part 90 status. Tr. 401. We note that Goff actually filed his application on January 14, 1984. After that date Goff easily could have notified Y&O personnel that he had filed for Part 90 status (for example: in his January 16, 1984, letter to Weber or at the January 19, 1984, meeting). Goff did not do so. We hold that the record therefore supports the judge's finding that there is no "evidence that any Y&O personnel knew, prior to his discharge, that [Goff] had filed a Part 90 application." 8 FMSHRC at 744.

7/ Goff also argues that Y&O interfered with his section 105(c)(1) rights by failing to report his illness as required by 30 C.F.R. Part 50 when Y&O first became aware that he had been diagnosed with pneumoconiosis. We do not agree. Under Part 50, an operator is required to report illness, including pneumoconiosis, to the appropriate MSHA District Office and to the MSHA analysis center in Denver. 30 C.F.R. §§ 50.20 and 50.20-6. Failure to report as required may be a violation of Part 50, but it does not constitute discrimination. The purpose of reporting a miner's illness under Part 50 is to gather occupational illness statistics, not to effectuate the rights of medical evaluation and transfer inherent in Part 90 and protected by section 105(c)(1).

Moreover, substantial evidence supports the judge's conclusion that even if Y&O had known that Goff applied for Part 90 status, it is not reasonable to believe it would have been motivated to discharge him on that basis because Part 90 status would not have affected Goff's work assignment. The Nelms Mine manager testified that during 1984 the average concentration of respirable dust in areas outby the faces was 0.55 mg/m^3 of air, and the average concentration in inby areas was less than 1.0 mg/m^3 of air. That testimony was not disputed. 8/ Nevertheless, Goff stated in his letter to Weber that on the advice of his doctor, he would be off work until he had a dust free job. Neither the Act nor Part 90 gives a miner with evidence of the development of pneumoconiosis the right to work in a mining environment that is totally free of respirable dust. Rather, section 203(b)(2) of the Act, 30 U.S.C. § 843(b)(2), and 30 C.F.R § 90.3(a) give a miner with evidence of the development of pneumoconiosis the right to exercise an option to transfer to an area of the mine with an average respirable dust concentration at or below 1.0 mg/m^3 of air, not to cease work altogether.

There is no proof in this record that Goff would have encountered excessive and impermissible respirable dust concentrations in his underground assignment. As previously indicated, there is persuasive evidence that during 1984 the average concentration of respirable dust in areas outby the faces was 0.55 mg/m^3 of air and the average concentration in inby areas was less than 1.0 mg/m^3 of air.

By refusing to report to work until he was assigned a dust-free job, Goff acted beyond the purview of section 203 of the Act and 30 C.F.R. Part 90. As such, his work refusal was not protected by the statute.

8/ Although the mine manager's testimony was based on the results of respirable dust samples taken pursuant to 30 C.F.R. Part 70, the results are indicative of the respirable dust concentrations that Goff could expect to encounter. They reflect average concentrations of respirable dust in areas where Goff ordinarily would be expected to work. Tr. 355-56.

IV.

We find that Goff did not establish that the protected activity, being "the subject of medical evaluation and potential transfer", in any way motivated Y&O to discharge him. Rather, Y&O discharged Goff because he refused to report for work as ordered. We therefore affirm the judge's dismissal of Goff's complaint.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 30, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. CENT 85-109
KELLEY TRUCKING COMPANY	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), Commission Chief Administrative Law Judge Paul Merlin issued an Order of Default on July 21, 1986, finding Kelley Trucking Company ("Kelley Trucking") in default and assessing a civil penalty of $400. Approximately four and one-half months later, the Commission received a handwritten letter from Curtis Kelley, president of Kelley Trucking, requesting a hearing. For the reasons explained below, we deem this letter to constitute a request for relief from a final Commission order, vacate the judge's default order and remand for further proceedings.

On April 18, 1985, an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Kelley Trucking a citation pursuant to section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), and a withdrawal order pursuant to section 104(g)(1), 30 U.S.C. § 814(g)(1), alleging a violation of 30 C.F.R. § 48.25(a). This enforcement action was taken on the grounds that two of the company's drivers, hauling coal under contract at the Bokoshe N.W. Mine of Commercial Fuels, Inc. ("Commercial Fuels"), lacked required miner's training. On June 20, 1985, MSHA's Office of Assessments, under the special assessment procedures of 30 C.F.R. § 100.5, notified Kelley Trucking that it proposed a civil penalty of $400 for the alleged violation. On July 12, 1985, Kelley Trucking timely filed its "Blue Card" request for a hearing before this independent Commission. On August 20, 1985, the Secretary of Labor filed a Complaint Proposing Penalty. The record indicates that Kelley Trucking did not file an answer to the complaint.

On April 25, 1986, approximately eight months after the Secretary's complaint was filed, Judge Merlin issued an Order to Show Cause directing Kelley Trucking to answer the complaint within 30 days or be placed in default. On July 21, 1986, for failure to respond to the show cause order or to file the requested answer, the judge issued an Order of Default against Kelley Trucking directing it to pay the $400 civil penalty proposed by the Secretary. Kelley Trucking did not file with the Commission a request for review of the default order and review was not directed by the Commission on its own motion. Accordingly, the judge's default order became a final order of the Commission 40 days after issuance. 30 U.S.C. § 823(d)(1).

On December 8, 1986, the Commission received by certified mail a four-page, handwritten letter of explanation from Curtis Kelley, owner of Kelley Trucking, attached to which was a copy of a letter dated July 30, 1986, on behalf of Kelley Trucking to Allen R. Tilson, Esq., of the Secretary's Office of Solicitor in Dallas, Texas. In addition to contesting the violation and requesting a hearing, the December 8 letter stated that after receiving "the letter" from Judge Merlin, "everytime I would get any mail concerning this matter, I would answer ... and would ask for a hearing." Kelley stated specifically that he had answered the April 25, 1986 show cause order, requesting a hearing, but had received no response. The July 30, 1986 letter to the Secretary's Solicitor's Office explained Kelley's position generally and his inability to pay the civil penalty in one lump sum.

The judge's jurisdiction in this matter terminated when his default order was issued on July 21, 1986. 29 C.F.R. § 2700.65(c). Because the judge's decision has become final by operation of law, Kelley Trucking's request for a hearing must be construed as a request for relief from a final Commission decision incorporating by implication a late-filed petition for discretionary review. See, e.g., M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1270-71 (September 1986). Two questions are presented: (1) whether preliminary relief should be permitted by accepting Kelley Trucking's letter as a late-filed petition for discretionary review; and (2) whether the judge's default order should stand or Kelley Trucking's failure to answer the complaint and show cause order should be excused and the proceeding on the merits reopened. Id.

We address the first question with reference to the standards set forth in Fed. R. Civ. P. 60(b)(1), which provides:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ... mistake, inadvertence, surprise, or excusable neglect; ... or ... any other reason justifying relief from the operation of the judgment.

Kelley Trucking appears to be a small, independent trucking firm, and has proceeded without benefit of counsel. On its face, Kelley Trucking's

December 1986 letter also reveals a lack of understanding of relevant Mine Act and Commission procedures and confuses the separate roles of the Commission and the Department of Labor. We note in mitigation that Kelley Trucking did arrange to have a letter sent to the Department of Labor's Dallas Office explaining its general situation shortly after issuance of the default order. Under the circumstances, we accept Kelley Trucking's submission as a late-filed petition for discretionary review. See Sundt, supra, 8 FMSHRC at 1271.

As to the substantive aspects of Kelley Trucking's request, we have observed repeatedly that default is a harsh remedy and that if the defaulting party can make a showing of adequate or good cause for the failure to respond, the failure may be excused and appropriate proceedings on the merits permitted. Sundt, 8 FMSHRC at 1271. Rule 60(b)(1) factors in the forefront, we find relevant the fact that the company appears to be a small trucking firm, which has proceeded without benefit of counsel. The company filed a timely "Blue Card" request for a hearing. Kelley Trucking's December letter alleges that it submitted a response to the judge's show cause order and that it communicated in good faith throughout the proceedings below. The record does not contain any such response to the show cause order. However, Kelley Trucking has raised the possibility of an unintended failure of communication or breakdown in the mail delivery system. On the present record, we cannot evaluate the credibility of this assertion and are not prepared to rule summarily. Sundt, 8 FMSHRC at 1271. In the interest of justice, we conclude that Kelley Trucking should have the opportunity to present this position to the judge, who shall determine whether relief from the default order is warranted.

For the foregoing reasons, the judge's default order is vacated and the matter is remanded for proceedings consistent with this order. Kelley Trucking is reminded to serve the opposing party with copies of all its correspondence and other filings in this matter. 29 C.F.R. § 2700.7.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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Chief Administrative Law Judge Paul Merlin
Federal Mine Safety & Health Review Commission
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 30, 1986

LEO KLIMCZAK	:	
	:	
v.	:	Docket No. YORK 82-21-DM
	:	
GENERAL CRUSHED STONE CO., INC.	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

ORDER

BY THE COMMISSION:

Leo Klimczak has filed with the Commission a motion seeking a new hearing in this matter. On April 6, 1983, Commission Administrative Law Judge Gary Melick issued a decision dismissing Mr. Klimczak's discrimination complaint; that decision became a final order of the Commission by operation of the statute, and on March 9, 1984, the United States Court of Appeals for the Second Circuit affirmed the judge's decision. 5 FMSHRC 684 (April 1983)(ALJ), aff'd mem., No. 83-4122 (2d Cir. March 9, 1984). For the reasons that follow, the motion for a new hearing is denied.

The basis of Klimczak's motion is an assertion that he has obtained new evidence, which he claims establishes his complaint of discrimination. Once a petition for review of a final Commission decision is filed in a federal court of appeals, the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), provides that jurisdiction to entertain a motion for leave to adduce additional evidence rests exclusively with the court while the petition is pending before it. 30 U.S.C. § 816(a). As noted above, this matter was reviewed in the Second Circuit, and Klimczak did not seek permission during that proceeding to adduce additional evidence.

Even assuming that the Commission has jurisdiction in this matter, this motion, filed more than two and one-half years after the court's decision, is seriously untimely (cf. Fed. R. Civ. P. 60(b), which provides a one-year time limit for motions requesting relief from a final judgment on the basis of newly discovered evidence). Further, Klimczak fails to demonstrate why this alleged new evidence could not have been discovered earlier with the exercise of due diligence.

Accordingly, the motion for a new hearing is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Mr. Leo Klimczak
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Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 3 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 84-185
	:	A.C. No. 15-13862-03510
v.	:	Peacock Mine No. 1
ANLO ENERGY, INC., Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for Petitioner;
Respondent did not appear at the hearing.

Before: Judge Fauver

This case was brought by the Secretary of Labor for assessment of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

Respondent did not appear at the hearing, but submitted a letter stating its position on the charges. Having considered the letter, the hearing evidence, and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

1. At all relevant times, Respondent operated Peacock Mine No. 1 at Greenville, Hopkins County, Kentucky. It had operated the Peacock Mine No. 1 since December 1, 1982. The Peacock Mine No. 2 is an underground coal mine operating two shifts per day, employing 15 to 20 employees, and producing coal for resale in interstate commerce.

2. Respondent had a history of twelve violations of the Act between December 1, 1982, and March 25, 1984, including electrical, roof control, ventilation, methane monitor, and two recordkeeping violations.

3. In a spot inspection of the Peacock Mine No. 1 in March, 1984, Inspector Curtis Haile found that around the general face area water was ranging in depth from 0 to 10 inches. The floor of the mine was erratic in height, and the

water level varied depending on the floor. Inspector Haile issued § 107(a) withdrawal order on March 26, 1984, after finding an imminent danger because of defects in the power center. In connection with that order, on the same day he issued Citations 2338752 and 2338753, which are the subject of this proceeding.

4. Citation 2338752 was issued for a violation of 30 C.F.R. § 75.900 in that grounded phase protection was not provided for three phase circuits on the power center. Inspector Haile tested these circuits by simulating a ground fault condition by the use of a five amp fuse. He testified that, during the first test on the first breaker, the breaker tripped as normal, but when he checked the remaining breakers, none of them would de-energize. He went back and checked the first breaker and it also failed to trip. He testified that the first breaker test in which the breaker tripped as normal was most likely faulty because of a carbon arc or a very small wire connecting its zig zag transformer, which burned out in the second test. He stated that when he checked the power center to verify abatement, he found that the grounding resistors had been completely bypassed. This resulted in a grounded system with no circuit limitation. Inspector Haile testified that it was highly likely this condition would result in a fatal accident involving at least one person should a ground fault condition appear on the frame of any piece of equipment. He testified that a reasonably qualified electrician would have detected the condition upon testing, and that it was negligence to bypass the grounding resistors.

5. Citation 2338753 was issued for a violation of 30 C.F.R. § 75.902 in that the ground monitoring circuits were not operative on the main power center. Inspector Haile testified that ground monitoring circuits are required to ensure that there is a viable ground wire continuously in operation from the power system center to the frame of the piece of equipment. In the event that a ground fault occurs, this would provide a path for energy to return from the frame of the equipment to the power center where it would be de-energized by a breaker. Inspector Haile found three separate circuits in which the ground wire monitor was not functioning: shuttle car number three, a satellite pump, and shuttle car number two. None of these was tagged out and all of them were available for use. Inspector Haile testified that it was likely that the satellite pump would be used sometime in the near future and that the shuttle car circuits were used routinely in coal production operations. This was a very serious violation in that, at any given time, the ground wire could sever due to faulty manufacture, a faulty splice, or normal wear and tear. If the ground wire were severed and the machinery were involved in a ground fault,

the hazard could result in a fatality. Normally the ground monitors would be checked weekly.

6. Respondent presented no claim or evidence of financial hardship with respect to payment of the proposed penalties.

DISCUSSION WITH FURTHER FINDINGS

The violation charged in citation 2338752 was due to negligence in that the company knew or should have known of the violation. It was likely that the condition would cause a fatality.

The violation charged in citation 2338753 was due to negligence in that the company knew or should have known of the violation. It was a serious violation with a risk of a fatality.

Respondent is a small operator within the meaning of the Act.

Respondent had a total of 12 reported citations from December 1, 1982, to March 25, 1984. Six of these citations were significant and substantial and one was accompanied by a § 107(a) order. Prior violations include a cable violation, a ground monitor violation, an improper identification of circuit breaker violation, improper splicing of cables, and improper inspection and cover plates.

The violations involved here were both abated within the time given.

Considering all of the criteria of § 110(i) of the Act for assessing civil penalties, Respondent is ASSESSED a penalty of $900 for the violation charged in Citation 2338752 and a penalty of $550 for the violation charged in Citation 2338753.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondent violated 30 C.F.R. § 75.900 as alleged in Citation 2338752.

3. Respondent violated 30 C.F.R. § 75.902 as alleged in Citation 2338753.

ORDER

Respondent shall pay the above civil penalties in the total amount of $1,450.00 within 30 days of this Order.

William Fauver
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 3 1986

JOHNNY WALL,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. WEVA 86-87-D
	:	MSHA Case No. HOPE CD 86-1
DAVIDSON MINING, INC.,	:	
Respondent	:	No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Koutras

Statement of the Case

This discrimination case was scheduled for a hearing on October 21, 1986, in Beckley, West Virginia, and the parties were so informed by my Notice of Hearing of August 6, 1986. On September 25, 1986, complainant's counsel Kathryn R. Bayless advised me by telephone that the parties agreed to settle the matter, and that they would file their joint settlement agreement with me within the next week. In view of the settlement, the scheduled hearing was cancelled, and the parties were so informed by my order of October 9, 1986. The parties were requested to file their settlement agreement with me by October 19, 1986. They have failed to do so.

In view of the failure by the parties to file their settlement agreement with me, or to otherwise communicate with me regarding the status of the case, I issued an order on November 11, 1986, directing the parties to show cause why this matter should not be dismissed because of their failure to respond to my orders. The parties have again failed to respond.

ORDER

In view of the failure by the parties to respond to my Orders, this matter IS DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 4 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 86-53
	:	A.C. No. 15-12129-03519
v.	:	
	:	No. 4 Mine
TACKETT MINING, INC., Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for the Petitioner.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $900 for an alleged violation of mandatory safety standard 30 C.F.R. § 75.400, as stated in a section 104(d)(1) "S&S" Citation No. 2470592 served on the respondent on August 7, 1985. The citation was issued after an inspector observed an accumulation of loose coal and coal dust to a depth of 1 to 6 inches along a belt conveyor.

The respondent filed a timely answer, and the case was docketed for a hearing in Paintsville, Kentucky, with several other cases during the hearing term November 18-20, 1986. However, in view of a proposed settlement agreement, no testimony was presented at the hearing, and the petitioner was permitted to file the proposed settlement motion for my consideration pursuant to Commission Rule 30, 29 C.F.R. § 2700.30, and it was approved from the bench (Tr. 3).

Discussion

In support of the proposed settlement disposition of this case, the petitioner has submitted information pertaining to the six statutory civil penalty criteria found in section 110(i) of the Act. In addition, the petitioner has submitted a full discussion and disclosure as to the facts and circumstances surrounding the issuance of the citation in question, and a reasonable justification for the reduction of the original proposed civil penalty assessment. The proposed settlement requires the respondent to pay a civil penalty assessment of $300 for the violation in question.

The information submitted by the parties reflects that the respondent is a small mine operator with 11 employees and 25,000 tons of coal production in 1985. A letter from the respondent's CPA reflects that the mine operated at a loss of $16,384.27, for the year ending December 31, 1985, and expects a loss as high as $50,000 for 1986. The parties agree that the initial civil penalty proposal of $900 would affect the respondent's ability to continue in business

Conclusion

After careful review and consideration of the pleadings, arguments, and submissions in support of the motion to approve the proposed settlement of this case, I conclude and find that the proposed settlement disposition is reasonable and in the public interest. Accordingly, pursuant to 29 C.F.R. § 2700.30, the motion IS GRANTED, and the settlement IS APPROVED.

ORDER

Respondent IS ORDERED to pay a civil penalty in the amount of $300 in satisfaction of the violation in question within thirty (30) days of the date of this decision and order, and upon receipt of payment by the petitioner, this proceeding is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

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Mr. Jerry Tackett, President, Tackett Mining, Incorporated, Post Office Box 1412, Paintsville, KY 41240 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

DEC 4 1986

LESTER R. COPELIN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. LAKE 86-50-D
v.	:	
B & L S CONTRACTING, INC., Respondent	:	

DECISION

Appearances: Lee J. Hoefling, Esq., Rusk, Overton & Hoefling, Washington, Indiana for Complainant; Martin J. Klaper, Esq., and Douglas C. Haney, Esq., Ice, Miller, Donadio & Ryan, Indianapolis, Indiana, for Respondent.

Before: Judge Broderick

STATEMENT OF THE CASE

Complainant contends that he was discharged from his job as heavy equipment operator for Respondent because of activities protected under the Federal Mine Safety and Health Act of 1977 (the Act). Pursuant to notice, the case was called for hearing on June 25, 1986 in Evansville, Indiana. Lester Copelin testified on his own behalf. John Jackson, Cletus Taylor, Walter Roy, Larry Spencer and James Craig tetified for Respondent. Both parties have filed post hearing briefs. Based on the entire record and considering the contentions of the parties, I make the following decision.

FINDINGS OF FACT

Complainant worked for Respondent from about January, 1979 until he was discharged on April 9, 1985. He was a heavy equipment operator, primarily operating a 992 Caterpillar loader at Respondent's Apraw Mine, a surface coal mine near Washington, Indiana. His duties were to load overburden into the loader bucket and take it to waiting dump trucks. Prior to April, 1985, his work was generally satisfactory except for some complaints of being a little slow and not working well in the presence of water in the pit. Complainant worked the night shift, from 6:00 p.m. to 5:30 a.m. He was paid $12.85 an hour.

On a number of occasions beginning in about 1983, Complainant complained to foremen Walter Roy and Larry Spencer about the improper placement of light plants at the pit causing glare and shadows, and making it difficult for the loader operators to see very well. When these complaints were made, the foremen generally attempted to move the light plants to minimize the problem. There were instances when it was not possible to relocate the light to avoid glare and shadows, and there were other instances when the foremen ignored his complaints. Complainant never complained to the Mine Safety and Health Administration about the placement of light plants. Similar complaints were made by other loader operators and others working in the pit area at night.

In about March, 1985, a highwall collapsed at the mine. Larry Spencer, the foreman, in commenting on the collapse, stated that accidents like that just happen occasionally. Complainant told Spencer that they did not have to happen when cracks in the wall were evident. Complainant complained to his foremen on prior occasions of cracks in highwalls.

On April 3, 1985, night shift superintendent Frank Dermon asked Pit foreman Cletus Taylor why the 992 loader operated by Complainant was being operated at such slow pace. Dermon directed Taylor to talk to Complainant about why the work was progressing so slowly. Complainant had been assigned to dig out a ramp and haul it away from the coal seam. Taylor asked Complainant if there was anything wrong with the loader and was told that there was not. Taylor operated the loader himself and determined that there were no problems with it. He told Complainant that he was going to have to pick up his rate of speed and load a little faster. There were no light plant problems that night and the work was being performed on level ground.

At the end of the shift on April 4, 1985 at between 6 and 7 a.m., Complainant approached John Jackson, Mine Superintendent and told him that he had been reprimanded by Pit Foreman Taylor for working too slowly. Complainant thought the reprimand was unfair because he was getting as much out of the machine as it was capable of. Jackson told him he would look into the matter. Jackson timed the cycles of the 992 loader operators on the day shift. The cycle times varied from 32 to 38 seconds. Cycle time is the elapsed time from the dumping of a load in a truck, returning to the spoil pile, loading the bucket and returning to the truck. At the beginning of the next night shift (April 4), Jackson asked Taylor to time Complainant's cycles for 30 minute time periods 2 or 3 times during the shift. Taylor did time his cycles during three 30 minute periods. The average cycle time was 60 seconds. Taylor also timed Complainant's cycles on

April 4. The times ranged from 50 to 60 seconds. He also timed the cycles on the day shift of April 5 and the cycle times varied from 32 to 38 seconds. On Monday April 8, Jackson timed the cycles on the day shift and they again ranged from 32 to 38 seconds. He timed Complainant early in his shift on April 8, and found his cycle times ranged from 50 seconds to 60 seconds plus. Jackson then went to talk to Complainant and told him that he had checked his complaint and found that Complainant's cycle times were too slow and that his work pattern was inefficient. Jackson said Complainant would have to improve quick or he would be replaced. Complainant replied: "If you don't like my work, send me down the road." (Tr. 50) Complainant was sent back to work and Jackson went home (about 8 or 9 p.m.). Jackson returned at about 4 a.m., April 9 and again checked Complainant's cycle times. They varied from 50 seconds to over 60 seconds. Jackson then decided to terminate Complainant. He informed Complainant of the decision at the beginning of the second shift on April 9.

The pit area where Complainant worked on April 3/4 was flat. Complainant contends that on April 8/9 he was "digging downhill at a reasonably steep angle. . ." (Tr. 12) He stated that the angle of the slope was "probably four to one." (Tr. 27) Jackson stated that the slope was approximately 10 percent -- "somewhere about 10 feet per hundred feet drop." (Tr. 56) Pit Foreman Walter Roy stated that the slope on which Complainant worked "wasn't near that steep (four to one)" (Tr. 96). He also testified that the slope "wasn't flat. It was comfortable." (Tr. 99). I find that on April 8/9 Complainant was digging on a downhill slope of approximately a 10 percent grade, and this grade should not significantly affect the cycle time of a loader operator.

After his discharge, Complainant began working for Gohmann Asphalt and Construction Company in May, 1985 as a heavy equipment operator. He was laid off in November, 1985, and returned to work in March, 1986. He is paid $16.50 an hour.

ISSUES

1. Was Complainant discharged for activities protected under the Act?

2. If so, what remedies are appropriate for the discriminatory discharge?

CONCLUSIONS OF LAW

1. JURISDICTION

Respondent operated a surface coal mine subject to the Act. Complainant was a miner and is protected by section 105(c) of the Act. I have jurisdiction over the parties and subject matter of this proceeding.

2. DISCRIMINATION-GENERAL RULE

Under the Act, a miner can establish a prima facie case of discrimination by showing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. Secretary/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary/Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If the operator cannot rebut the prima facie case in this manner, it may affirmatively defend by showing that it was motivated also by the miner's unprotected activities and would have taken the adverse action for the unprotected activites alone. Pasula, supra; Simpson v. Kenta Energy Inc., 7 FMSHRC 1034 (1986).

3. PROTECTED ACTIVITY

Complainant's complaints about the improper placement of light plants causing glare and other obstructions to his vision obviously were related to the safe operation of his loader. Therefore, these complaints constituted activity protected under the Act. Complainant's discussion with Spencer following the highwall collapse in March, 1985 was a general statement of blame and is too amorphous to constitute protected activity. Complaints of visible cracks in the highwall would be protected. However, Complainant's testimony concerning such complaints was vague and totally lacking in specificity.

Refusal to work at a pace which would affect safety would be protected under the Act. But Complainant did not refuse to speed up his cycle time. He stated that he was unable to work at the required pace. Inability to work at the speed required by a mine operator is not protected by the Act. The evidence does not show that because of safety concerns, Complainant worked at a slower pace than Respondent demanded.

ADVERSE ACTION AND MOTIVATION

Complainant was discharged ostensibly for working too slowly. There is no evidence that his previous complaints regarding the placement of light plants or the cracks in the highwall played any part of Respondent's decision to discharge him. The evidence is overhwelming that the decision to discharge was motivated solely by Complainant's slowness in operating his machine. Complainant contends that conditions in the pit made a 37 second cycle time unsafe. However, he also testified that he "went as fast as [he] could" (Tr. 18). The thrust of his testimony is that he was unable to work as fast as Respondent desired. Whether it was fair to terminate an employee with 6 years seniority on the basis of slow work performance for 3 or 4 days is not an issue that I have to resolve. I conclude that Complainant's discharge was not motivated in any part by activity protected under the Act. If it were, I would conclude that the evidence establishes that Respondent would have terminated him in any event for unprotected activities alone.

ORDER

Based upon the above findings of fact and conclusions, the complaint and this proceeding are DISMISSED because the evidence does not establish a violation of section 105(c) of the Act.

James A. Broderick

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 5 1986

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 86-286 A.C. No. 46-01735-03539
v.	:	Docket No. WEVA 86-317 A.C. No. 46-01735-03540
KING'S MILL ENERGY, INCORPORATED, Respondent	:	Docket No. WEVA 86-318 A.C. No. 46-01735-03541
	:	King's Mill No. 1 Mine

DECISION

Appearances: Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Petitioner;
Paul O. Clay, Jr., Esq., King's Mill Energy, Incorporated, Fayetteville, West Virginia, for Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging King's Mill Energy, Incorporated (King's Mill) with regulatory violations and seeking an appropriate civil penalty for each violation. At hearings held in Charleston, West Virginia the parties agreed to settle all but one of the citations at issue proposing a reduction in penalties from $995 to $745. I have considered the representations and documentation submitted in connection with the settlement proposal and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act.

The remaining citation, Citation No. 2715285,alleges a "significant and substantial" violation of the operator's roof control plan under the standard at 30 C.F.R. § 75.200 and charges as follows:

> The approved roof control plan, permit no. 4-RC-11-70-1123-13 was not being followed in that a miner was permitted to work inby permanently and temporarily supported roof in the last cross-cut

between the No. 4 and No. 5 entries on the North Mains Section. A roof fall occurred fatally injuring the miner. The fall measured 15'9" X 7'7" and 0-8 inches thick.

King's Mill admits that it violated the roof control plan as alleged and concedes that the violation was "significant and substantial" and serious. It argues only that the proposed penalty of $3,000 was excessive in that the violation was not the result of its negligence.

The relevant provisions of the roof control plan read as follows:

> When loose, broken, or drummy roof is encountered, mining shall be discontinued and bolts shall be installed on 4-foot lengthwise and crosswise spacing to within 4 feet of the face before mining is resumed. When mining in conditions described above, the length of the miner runs shall be limited to a depth that no person will be required to advance inby the last row of bolts during mining operations. (Government Exhibit 5 page 18 ¶ 4)

MSHA's undisputed investigative report reads, as relevant hereto, as follows:

> On Tuesday, November 5, 1985, at about 7:50 a.m., the day shift production crew under the supervision of Charles Sawyers, section foreman, arrived on the north mains (013 MMU) section. Sawyers conducted a preshift examination of the section and assigned work duties. Mining, with a Wilcox Mark 22 continuous mining system, was started in the No. 3 to No. 2 crosscut and then continued in the No. 3 entry face.
>
> According to Franklin Scott, continuous miner operator, and Frank Stevens, front bridge conveyor operator, the roof became drummy and loose in the No. 3 entry face area as the coal was cut from the mine roof. Mining was stopped and the continuous mining machine trammed out of the No. 3 entry into the No. 4 to No. 5 entry crosscut. This crosscut had been mined through into the No. 5 entry by this section crew on November 4, 1985. According to Sawyers, the cut through lift was about 14 feet wide and was done to provide better face ventilation across the section. This cut through was roof bolted during the evening shift on November 4, 1985. Scott stated that he trammed the continuous mining machine into the mined through area and mined two or three runs (lifts) across the coal face, which

further opened the crosscut into the No. 5 entry. Sawyers was helping Ronald Lane, timberman, set timbers and clean the right side of the crosscut opening during this mining. Sawyers then instructed Scott to move the continuous mining machine back into the crosscut and shear (slab) the left ribline to widen the crosscut so that the continuous mining system could be advanced into the No. 5 entry. Sawyers then left the area to conduct a preshift examination for the evening shift. Lane crossed the bridge conveyor to the left side of the crosscut and Scott moved the mining machine back. Scott began shearing the rib line and Lane followed timbering and cleaning along the left rib beside the mining machine.

During this mining a portion of the newly exposed roof, measuring 15' 9" X 7' 7" X 0-6" thick, fell along the sheared left rib. Scott stated that he was not facing the rib at the time of the fall and due to low mining height limiting his visibility, was unsure as to the whereabouts of Lane. Scott stopped the machine, crossed the bridge conveyor, and saw that Lane had been covered with the fallen slate. Scott summoned the foreman and mine electrician, Albert Sawyers, for help. These men used a lifting jack with timbers for blocking and recovered Lane from under the rock. Lane was examined and no vital signs found. Lane was transported to the surface into an awaiting ambulance and taken to a local hospital where he was pronounced dead on arrival.

It is undisputed that had the fallen rock been tested by the sound and vibration method prior to its falling it would have sounded "drummy" and that the cited area had not been roof bolted. The evidence also shows that the deceased had 7 years underground coal mining experience, had completed 9 days of training at the King's Mill No. 1 mine and had been working by himself at this mine for 4 or 5 days. Mine Superintendent Burke had also personally reviewed the roof control plan with the deceased. In addition before he left the deceased on the day of this incident the section foreman had reminded the deceased that the top was "drummy" in the cross-cut and had warned him to stay on the right side of the cross-cut away from the endangered area.

Superintendent Burke observed that the deceased was in violation of company policy by placing himself inby permanent supports under these circumstances. Burke had fired 2 miners for similar violations of company policy. He could offer no explanation as to why the deceased had violated this policy on this occasion.

In arguing that the Respondent was negligent the government maintains that the deceased was a new employee with less than 3 weeks experience and had not been subject to a "written" training program. This argument does not however take into consideration that the deceased was a miner with many years experience and had been specifically trained in the roof control provisions barring miners inby roof bolts where drummy conditions existed. The government's argument also fails to take into consideration the undisputed evidence that Sawyers specifically warned Lane about the drummy roof conditions in the cross-cut at issue and told him to stay on the right side of the cross-cut, an area which had been properly supported.

The government next contends that the operator's negligence may be shown by the fact that the section foreman had taken the deceased inby the roof bolt support on the right side of the No. 5 entry earlier on the shift at a time when the continuous miner was allegedly cutting coal. It is undisputed however that the miner was not in fact cutting coal when Sawyers and Lane were at the right side of the No. 5 entry. Moreover it is clear that this area was not a "drummy" area and it was accordingly permissible for miners to be in the area that was then supported by timbers. Thus it was not a violation of the roof control plan for Sawyers and Lane to have positioned themselves in the noted area and Lane could not therefore have inferred from this positioning that it was somehow acceptable to violate the roof control plan. Under the circumstances there is insufficent evidence to support a finding of operator negligence as alleged.

In assessing a penalty for this violation I have also considered that the operator is small in size and has a moderate history of violations. There is also no dispute that the violation was abated in accordance with MSHA's directives. Under the circumstances a penalty of $100 is deemed appropriate for the violation.

ORDER

King's Mill Energy Incorporated is directed to pay civil penalties of $845 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

Page H. Jackson, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Blvd., Rm 1237A, Arlington, VA 22203 (Certified Mail)

Paul O. Clay, Jr., Esq., King's Mill Energy, Inc., P.O. Box 871, Fayetteville, WV 25840 (Certified Mail)

rbg

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 8 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DuWAYNE SCHAFER, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 85-89-D
	:	Glenharold Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

SUPPLEMENTAL DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Complainant;
Gregory Lange, Esq., Richardson, Blaisdell, Isakson and Lange, Hazen, North Dakota, for Respondents;
Deborah Fohr Levchak, Esq., Office of the General Council, Basin Electrical Power Cooperative, Bismarck, North Dakota, for Respondents.

Before: Judge Lasher

In accordance with the decision in this matter dated October 17, 1986, the parties have conferred and reached a stipulated agreement as to the costs and expenses incurred by the individual complainant, DuWayne Schafer, in connection with the institution and prosecution of this proceeding in the total sum of $273.76. Pursuant to such agreement, Respondent agrees to immediately pay such sum to Complainant and indicates it is in the process of doing so. Accordingly, this agreement is approved.

Respondent also indicates that it has complied with or is in the process of complying with the requirements of my initial decision herein with respect to (a) removing the letter of reprimand from Complainant Schafer's personnel file and its records, (b) posting of the decision, and payment of civil penalty. The cooperation of the parties in bringing this matter to resolution is appreciated.

This supplemental decision, in combination with my original decision, constitutes final disposition of this matter before me and, upon its issuance by the Commission's Executive Director, terminates my jurisdiction herein pursuant to Commission rule 65(c).

Michael A. Lasher, Jr.
Administrative Law Judge

Distribution:

Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, 1585 Federal Building, 1961 Stout Street, Denver, CO 80294 (Certified Mail)

Gregory Lange, Esq., Richardson, Blaisdell, Isakson & Lange, 206 Central Avenue N., Hazen, ND 58545 (Certified Mail)

Deborah Fohr Levchak, Esq., Office of General Counsel, Basin Electric Power Cooperative, 1717 E. Interstate Avenue, Bismarck, ND 58501 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 9 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. KENT 86-16
	:	A.C. No. 15-15103-03505
v.	:	
	:	No. 1 Mine
TWIN STAR CONTRACTING COMPANY, INC., Respondent	:	

DECISION

Appearances: Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
Jerry Pelphrey, President, Twin Star Contracting Company, Paintsville, Kentucky, pro se, for Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a proposal for assessment of civil penalty filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking a civil penalty assessment of $400 for an alleged violation of mandatory safety standard 30 C.F.R. § 77.1606(c). The respondent filed an answer denying the violation, and a hearing was held in Paintsville, Kentucky, on November 18, 1986.

Issues

The issues presented in this proceeding are as follows:

1. Whether the respondent violated the cited mandatory safety standard, and if so, the appropriate civil penalty to be assessed for the violation based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S&S) finding concerning the violation is supportable.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Discussion

Section 104(d)(1) "S&S" Order No. 2468943, was served on the respondent at 3:15 p.m., on August 12, 1985, by MSHA Inspector R. C. Hatter. The inspector cited a violation of 30 C.F.R. § 77.1606(c), and the condition or practice is described as follows:

> The cat rock truck No. P120 exhibits an equipment defect affecting safety, not corrected prior to use of such truck, which is being used for spoil haulage in the pit, in that the outer edge of the rt. rear tire is badly worn and in one location approx. 3' long x 12-14" wide, the outer tread is gone and at least 10 or more layers or plies are worn through. The condition can result in a blow-out which can cause accident resulting in a serious injury. Such truck is subject to use on two shifts. Such condition is caused by an unwarrantable failure.

30 C.F.R. § 77.1606(c) provides as follows: "Equipment defects affecting safety shall be corrected before the equipment is used."

Petitioner's Testimony and Evidence

MSHA Surface Mine Inspector R. C. Hatter, testified as to his background and experience, and he confirmed that he inspected the mine on August 12, 1985, and issued the order in question. He confirmed that he issued the violation after observing that the right rear tire on a rock haulage truck which was in operation on the haulage road was badly worn. He described the condition of the tire and believed it was a safety hazard. In his

view, the condition of the tire presented a possible "blow-out" hazard. He confirmed that abatement was achieved within approximately 2 hours of the issuance of the order, and that the worn tire was replaced with a new one (Tr. 5-33; 63-64).

Respondent's Testimony and Evidence

Loyal E. Tackett, respondent's mine foreman, confirmed that he was aware of the condition of the tire in question, and given the prevailing conditions, including the speed of the trucks operating on the haulage road, the road terrain, and the fact that the truck normally travelled a distance of 400 to 500 feet, he was of the opinion that the condition of the tire did not present a hazard. He explained that tire maintenance is performed by a local contractor, and he identified a copy of a purchase order dated August 9, 1985, indicating that a replacement tire for the truck was on order at the time the violation was issued (Exhibit R-3, Tr. 38-51). He also confirmed that a new tire was installed on the cited truck to abate the violation on the same day that it was issued, and he identified a copy of a sales receipt reflecting that the cost of the new tire was $2,223.02.

Jerry Pelphrey, President, Twin Star Contracting Company, testified as to the condition of the tire in question, and in his view, it did not present a safety hazard. He confirmed that he is no longer in business at the No. 1 Mine, and stated that he closed down the operation in September, 1985, and with the exception of two drills, he has sold all of his equipment. He confirmed that abatement was achieved within 2 hours of the issuance of the order by the inspector by the installation of a new tire, and he asserted that a replacement tire had been ordered to replace the worn tire observed by the inspector (Tr. 51-53; 76-79).

At the conclusion of the testimony in this case, the parties agreed to settle the dispute by a mutual agreement requiring the respondent to pay a civil penalty assessment in the amount of $200 for the violation in question. Mr. Pelphrey stated that he was ready, willing, and able to pay the settlement amount and would remit payment to MSHA upon receipt of my decision and order in this case.

After review and consideration of all of the evidence, testimony, and arguments presented by the parties, including the requirements of Commission Rule 30, 29 C.F.R. § 2700.30, I issued a bench decision approving the proposed settlement by the parties. I took particular note of the fact that the

respondent was a small mine operator, and that its reported coal production in 1985 was 14,150 tons. I also considered the fact that the respondent is no longer in business, and that its prior history of assessed violations for the 2-year period August 12, 1983 through August 11, 1985, consists of 19 section 104(a) citations and one section 104(d)(1) citation. The total civil penalty assessments for these prior violations is $820, and the respondent has paid the full amount for all of these assessments.

ORDER

The respondent IS ORDERED to pay a civil penalty assessment in the amount of $200 in satisfaction of section 104(d)(1) Order No. 2468943, August 12, 1985, 30 C.F.R. § 77.1606(c). Payment is to be made to MSHA within thirty (30) days of the date of this decision and order, and upon receipt of payment, this matter is dismissed.

George A. Koutras
Administrative Law Judge

Distribution:

Mary Sue Ray, Esq., Office of the Solicitor, U.S. Department of Labor, 280 U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Mr. Jerry Pelphrey, President, Twin Star Contracting Company, Inc., 414 Broadway, Paintsville, KY 41240 (Certified Mail and Regular Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 9 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. PENN 86-165
	:	A.C. No. 36-02786-03510
v.	:	
	:	Docket No. PENN 86-192
SUGAR HILL LIMESTONE COMPANY, Respondent	:	A.C. No. 36-02786-03511
	:	
	:	Sugar Hill Strip

DECISION

Before: Judge Melick

By notice dated August 12, 1986, these cases were set for consolidated hearings to commence on October 7, 1986, in State College, Pennsylvania. The Secretary thereafter requested postponement because of the absence of a witness and the Respondent concurred in the request. By mailgram notice issued October 3, 1986 (followed by another notice by certified mail dated October 6, 1986) those hearings were rescheduled to commence November 4, 1986, in Pittsburgh, Pennsylvania. On October 9, 1986, this office received a copy of the above mailgram returned from Russell A. Smith on behalf of Respondent Sugar Hill Limestone Company (Sugar Hill) with the following handwritten notice thereon:

> As we discussed on Friday 10/3/86 - Pittsburgh would be farther from us than State College. Could we possibly have these hearings in Jefferson County. We cannot afford to lose a day of work to attend these hearings.

The undersigned responded to Mr. Smith on October 14, 1986, indicating that it was apparent that the hearings in the cases would in any event take a full day, that several other Commission cases were already scheduled for hearings in Pittsburgh that same week and that his particular request could not be accomodated. It was further noted that the distance from the mine site to Pittsburgh was not excessive and Mr. Smith was reminded that the failure of a representative to appear at the scheduled hearing could result in a default decision against the Respondent.

A notice of the specific hearing site was thereafter issued on October 23, 1986, designating the assigned courtroom in Pittsburgh. Subsequently, one day before the scheduled hearing, this office received a letter from Sugar Hill stating as follows:

> This letter is to inform you once again that there is no way that we can make a hearing in Pittsburgh. It is not a seventy mile trip but closer to one hundred and fifteen or twenty miles and when you consider Pittsburgh traffic a three to four hour trip.
>
> We feel since this happened in Jefferson County and not Allegheny that is where the case should be handled.
>
> We could arrange the use of the Reynoldsville Fire Hall Meeting Room at no cost if that would be suitable.

No representative of the operator subsequently appeared at the hearings as scheduled and accordingly an order to show cause was issued pursuant to Commission Rule 63, 29 C.F.R. § 2700.63, requiring a response on or before November 17, 1986. In a letter received November 17, 1986 Mr. Smith stated as follows:

> As we explained in our letter of 10-28-86; we feel we should be entitled to a hearing in Jefferson County. It is impossible for us to travel to Pittsburgh for hearing. We have many responsibilities to take care of daily and these must be done, and can be done in the time it would take us to travel the 100 plus miles each way. Another reason for us not reporting on November 4th was due to elections being held and to be in Pgh by 9:00 A.M., we would have had to leave before the polls opened. We hope you will find these adequate reasons.

It is the established law that the location of hearing sites is in the discretion of the Commission Administrative Law Judge. "In setting the hearing site he shall give due regard to the convenience of and necessity of the parties or their representatives and witnesses, the availability of suitable hearing facilities, and other relevant factors." 5 U.S.C. § 554(b); 30 U.S.C. § 815(d); Commission Rule 51, 29 C.F.R. § 2700.51; Secretary v. Cut Slate Inc., 1 FMSHRC 796 (1979). See also Secretary v. Sewell Coal Company, 2 FMSHRC 2479 (1980). In selecting a hearing site the judge

must therefore balance the public interest and due execution of the agency's functions with the convenience of the parties. Sewell Coal Company, supra at 2481.

In balancing these interests in these cases the undersigned was confronted with the fact that 3 other cases from the same region had also been scheduled for hearing the same week in Pittsburgh, that because of his caseload the judge had already scheduled trials for every work week for the following 4 months none of which were located in areas closer to Reynoldsville, and that while the judge had other cases to set for hearing in Pittsburgh after March he had no cases involving litigants in areas closer to Reynoldsville.

The litigants in the other cases before this judge are entitled to prompt hearings and disposition of their cases, and, accordingly, to best utilize limited judicial resources and maintain prompt disposition of cases the undersigned generally schedules cases for hearing in a centralized geographical location for the convenience of the maximum number of litigants.

In these particular cases I also considered that the distance from the mine site to Pittsburgh was not excessive (administrative notice may be taken of the American Automobile Association's estimate of 95 miles from Reynoldsville, Pennsylvania to Pittsburgh) and that counsel for the Secretary had proferred that based on the number of witnesses he anticipated calling in these cases that trial would take a full day whether it was held in Pittsburgh or Reynoldsville. Mr. Smith also claims he would have been unable to vote had be travelled to Pittsburgh. However he overlooks the availability of absentee balloting, a simple procedure which has been followed by the undersigned on this and many other occasions.

The lack of a courtroom or comparable facility and the lack of accomodations in the Reynoldsville area meeting the governmental budgetary ceiling were also factors, albiet secondary, considered in locating these hearings in Pittsburgh.

Within this framework I find that Sugar Hill must be held in default for failing to appear at the scheduled hearings in Pittsburgh. Accordingly the penalties proposed by the Secretary in these proceedings are now final. Commission Rule 63, 29 C.F.R. § 2700.63.

ORDER

The Sugar Hill Limestone Company is hereby directed to pay civil penalties of $1,492 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge

Distribution:

William T. Salzer, Esq., and Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480-Gateway Building, 3535 Market Street, Philadelphia, PA 19104 (Certified Mail)

Mr. Russell A. Smith, Partner, Sugar Hill Limestone Company, P.O. Box 69, Reynoldsville, PA 15851 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 10 1986

LARRY D. SWANEY, Complainant	:	DISCRIMINATION PROCEEDING
v.	:	Docket No. WEVA 86-444-D
	:	MSHA Case No. MORG CD 86-10
SOUTHERN OHIO COAL COMPANY, Respondent	:	Martinka No. 1 Mine

ORDER OF DISMISSAL

Before: Judge Koutras

On November 25, 1986, I issued an Order to Show Cause requiring the complainant to explain why his complaint should not be dismissed because of his failure to respond or even acknowledge the respondent's repeated discovery requests. The complainant has been totally unresponsive to the respondent's certified and regular first class mailings, and they have been returned "unclaimed" by the Post Office Department. My show cause order was issued in response to the respondent's motion to dismiss the complaint.

In addition to the matters pleaded by the respondent in support of its motion to dismiss, the complainant has failed to acknowledge the Notice of Hearing issued on September 24, 1986, and a subsequently issued Notice of Continuance issued on October 8, 1986, and the Post Office Department returned both notices as "unclaimed." The latter notice was mailed by certified mail and regular first class mail.

My show cause order was mailed by both certified mail and regular first class mail, and the respondent has again failed to respond even though he was advised to respond either in writing or personally by collect telephone call to my office. He has done neither, and has not since been heard from.

Under the circumstances, in view of the complainant's failure to respond to the respondent's legitimate discovery

requests, and to my show cause order, this case IS DISMISSED. The hearing scheduled for Morgantown, West Virginia, on December 16, 1986, IS CANCELLED.

George A. Koutras
Administrative Law Judge

Distribution:

Mr. Larry D. Swaney, Route 3, Box 410A, Morgantown, WV 26505 (Certified Mail and Regular Mail)

David A. Laing, Esq., Alvin J. McKenna, Esq., Porter, Wright, Morris & Arthur, 41 South High Street, Columbus, OH 43215 (Certified Mail)

/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

DEC 12 1986

IVAN MOORE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 85-183-D
v.	:	
MARTIN COUNTY COAL CORP., Respondent	:	

DECISION

Appearances: William Reaves, Esq., Ashland, Kentucky, for Complainant; Edwin S. Hopson, Esq., Louisville, Kentucky, and Leo A. Marcum, Esq., Inez, Kentucky, for Respondent

Before: Judge Fauver

This proceeding was brought by Complainant under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. Complainant charges a violation of section 105(c) based upon Respondent's constructive discharge of him on April 11, 1984.

Based on the hearing evidence and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Respondent, a Kentucky corporation, operates a coal mine in Martin County, Kentucky, where, at all pertinent times Complainant was employed.

2. The mine has regularly produced coal for sale or use in or substantially affecting interstate commerce.

3. Complainant began work for Respondent in 1975 and on August 4, 1983, he was employed as a fuel truck operator when he was injured as a result of a mine blast detonated by Respondent.

4. After a lengthy workmen's compensation proceeding, Complainant was found to be suffering an occupational disability of 30% (KY Workers' Compensation Board Op., Sept. 12, 1985).

5. In the course of the workmen's compensation proceeding, a superintendent of Respondent and the foreman in charge of Complainant both testified that Complainant's job consisted of driving a fuel truck, fueling the equipment and occasionally, in the winter, putting additives into the fuel. This testimony was given in depositions on January 5,1984.

6. Complainant decided, based on the above testimony, that he could hold Respondent bound by the limited job description in such testimony. He applied to return to work, and returned to work, in late March 1984.

7. For about 9 days on the job, Complainant operated the fuel truck and performed the fueling duties without incident. Then, on April 10, 1984, his supervisor, Herbert Meek, asked him to help out loading shot holes. Complainant stated that was not part of his job duties. Meek asked him to go with him to the superintendent, J.R. Stepp, to resolve the matter. Complainant told the superintendent that he could not load holes because his left shoulder still bothered him, and because of the testimony of the superintendent (previously referred to) that his job was only driving the truck, refueling equipment and occasionally putting additives into the fuel.

8. Stepp told Complainant that, if Meek needed him to load holes then he would have to load them, and when Complainant replied that he was not physically able to do that, Stepp suggested that he go to a doctor and get a slip showing he was restricted from loading holes. Stepp sent Complainant home with the suggestion that he get such a slip, but did not indicate whether he would be reinstated if such a slip were obtained.

9. Complainant left that day, and did not seek to get a restricted-duty slip from his physician. He has not returned to Respondent's employ since April 10, 1984.

10. Before April 11, 1983, Complainant had a number of incidents at Respondent's mine when he made safety complaints to his supervisors, and at least once he made a safety complaint to a government mine inpector with his supervisor's knowledge of such complaint. After the accident on April 11, 1983, Complainant charged Respondent with safety violations in connection with the blast and this charge was a major issue in the workmen's compensation case.

11. Respondent, through its supervisors, had regular knowledge of Complainant's history of making safety complaints, including his charge in the workmen's compensation case.

12. When Complainant returned to work in 1984, he came back with a tape recorder, and often turned it on in the presence of his supervisors to record their conversations with him. When he went back to work in 1984, Complainant intended to make an issue of the supervisors' previous depositions so that, in the event he was asked to load holes or do other manual labor except drive the fuel truck, refuel the equipment and occasionally put additives into the fuel, he would refuse to do such work. I also find that his supervisors were aware of this plan by Complainant and were, themselves, prepared to have a "showdown" with him on that issue.

13. Complainant testified that he cannot use his left arm in work and that he would be a "one-armed" man as a fuel truck operator.

DISCUSSION WITH FURTHER FINDINGS

Respondent has had a policy, at least since 1980, of not accepting restricted-duty slips from physicians when an hourly employee returns to duty after disease or injury. The employee must present an unqualified medical return-to-duty slip or he will not be permitted to return to duty. Complainant knew of this policy before 1984 and, when he applied to return to work in 1984, he was careful to get an unrestricted medical return-to-duty slip. He also decided not to get a restricted-duty slip after he was sent home on April 10, 1984, because he knew or believed that Respondent would not let him return to work with a restricted-duty slip.

He contends that he is able to do the job of fuel truck operator using only one arm. However, I find that the duties of that job reasonably require the use of both arms and both hands and that the Respondent has shown a reasonable basis for refusing to reinstate Complainant as a fuel truck operator after April 10, 1984, so long as he has contended that he can use only one arm.

With respect to his refusal to load shot holes, I find that such duties are within the scope of the required duties of his position and that, before and after the accident on April 11, 1983, his job was subject to the requirement that, if his supervisor asked him to load shot holes, he was required to do that work. I therefore find that Respondent was justified in sending Complainant home on April 10, 1984, for refusing to load shot holes.

Complainant has shown substantial protected activities involving his safety complaints before and after April 11, 1983, and before April 10, 1984. However, he has not shown by a preponderance of the evidence that Respondent's decision to send him home on April 10, 1984, was in any part motivated by discrim-

ination because of his protected activities. Also, his refusal to load shot holes was a sufficient independent cause for sending him home on April 10, 1984, and refusing to reinstate him after April 10, 1984, and would reasonably have resulted in such employer actions independent of his protected activities.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Complainant has failed to meet his burden of proving a violation of section 105(c) of the Act.

ORDER

WHEREFORE IT IS ORDERED that this proceeding is DISMISSED.

William Fauver
Administrative Law Judge

Distribution:

William C. O. Reaves, Esq., Dill & Scott, 1527 Central Avenue, P.O. Box 711, Ashland, KY 41105-0711 (Certified Mail)

Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, Citizens Plaza, Louisville, KY 40202 (Certified Mail)

Leo A. Marcum, Esq., McCoy, Marcum & Triplett, P.O. Box 1087, Inez, KY 41224 (Certified Mail)

slk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 12 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 86-76 A.C. No. 05-01370-03553
v.	:	Eagle No. 5 Mine
EMPIRE ENERGY CORPORATION, Respondent	:	

DECISION

Appearances: Margaret A. Miller, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
R. Henry Moore, Esq., Rose, Schmidt, Chapman, Duff & Hasley, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Lasher

Procedural Background

This proceeding was initiated by the filing of a petition for assessment of a civil penalty by the Secretary of Labor (herein the Secretary) on March 17, 1986, pursuant to Section 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 820(1977) (herein the Act). A hearing on the merits was held in Denver, Colorado, on August 6, 1986, at which both parties were ably represented by counsel.

The Secretary charges Respondent with violating 30 C.F.R. 75.1725(a) as described in Citation No. 2207389 issued October 4, 1985, as follows:

> "The double head roof bolter #18089 operating at 1st Left of the Set up entry at 14 East was being operated with the ATRS 1/ that was bleeding off the pressure (PSI). While 2 driller (sic) were drilling the ATRS dropped very slow 4 to 5 inches. The second time the ATRS dropped 4 to 5 inches all at once. There was an excessive hydraulic old leak on the right side drill pot and one hose was leaking right on the hydraulic pump assembly. This leak were (sic) corrected.
> The PSI was checked with a gauge and the PSI went up to 1725 PSI, then the motor was turned off and the pressure drope (sic) to 1500 PSI. Then it went down to 1350 PSI in

1/ "ATRS" stands for Automatic Temporary Roof Support (T. 12, 38).

2 1/2 minutes. The motor was started and it went up to 1625 PSI and while the motor was operating the PSI drope (sic) 150 PSI in 3 minutes."

30 C.F.R. 75.1725(a) provides:

"Machinery and equipment; operation and maintenance. (a) Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The alleged violation was characterized in the Section 104(d)(1) Citation as being "significant and substantial".

On October 7, 1985, the Inspector who issued the Citation, Ernesto L. Montoya, took subsequent action and "terminated" the Citation with the following indication for his justification:

"The ATRS jack was replaced on the double head roof bolt machine #18089."

In addition to Inspector Montoya, MSHA Inspector Alexander Kendzerski, a rebuttal witness, testified for Petitioner at the hearing. Three management personnel, James Hake, who was Respondent's Supervisor of Safety and Loss Control, Darrell Sparks, a maintenance foreman, and Randy Bunyon, maintenance superintendent, testified for Respondent.

The primary and dispositive issue in this matter is whether, in fact, the ATRS was not functioning properly, i.e. that it was dropping from its position at the roof because it was not "maintained in safe operating condition."

Preliminary Findings

At the commencement of the hearing the parties reached the following stipulations of facts and conclusions:

1. Respondent is engaged in the mining and selling of bituminous coal in the United States and its mining operations affect interstate commerce.

2. Respondent is the owner and operator of Eagle No. 5 Mine, MSHA I.D. No. 05-01370.

3. Respondent is subject to the jurisdiction of the Act.

4. The Administrative Law Judge has jurisdiction in this matter.

5. The subject Citation was properly served by a duly authorized representative of the Secretary upon an agent of Respondent on the date and place stated therein, and may be admitted into evidence for the purpose of establishing its issuance, and not for the truthfulness or relevance of any statements asserted therein.

6. The exhibits offered by Respondent and the Secretary are authentic (but no stipulation was reached made as to their relevance or the truth of the matters asserted therein).

7. The proposed penalty ($1,000.00) will not affect Empire's ability to continue in business.

8. The Respondent demonstrated good faith in abating the alleged violation.

9. Respondent is a large mine operator with production of 1.2 million tons in 1985.

10. In the 24-month period preceding the issuance of the Citation there were 247 inspection days at the mine.

11. The computer printout offered into evidence by the Secretary (P-1) is only relevant insofar as it reflects the number of violations between October 4, 1983 and October 3, 1985. Any violations on the printout which did not occur within that time period are not relevant.

The preponderant reliable and probative evidence of record established the following factual conformation and sequence of events.

On October 4, 1985, after a union complaint under section 103(g) of the Act was filed with MSHA, Inspector Montoya undertook an inspection of Respondent's Eagle No. 5 mine (T. 27-34).

Upon arriving at the mine, Inspector Montoya met with Respondent's Supervisor of Safety and Loss Control, Jim Hake, and while proceeding to the 14 East Section he handed Mr. Hake a copy of the union complaint. The complaint alleged that the ATRS was "bleeding off" (T. 26-28); that such had been reported for a week and that Randy Runyan, the maintenance superintendent, and "acting foreman James Pike" had not taken any steps to correct the condition (Ex. P-2). 2/

The ATRS, depicted in Exhibit P-3, is an attachment to a Fletcher Dual Head Roof Bolter (T. 37-39; P-3). It is operated

2/ The miner who filed the section 103(g) complaint did not testify.

by means of hydraulic pressure derived from two independent hydraulic pumps on the bolter itself (T. 39-40, 152). The ATRS consists of a T shaped beam or bar which is raised against the top and is hinged in the middle (T. 38-46; R-4, P-3). The T-bar is connected to a hydraulic cylinder which in turn is connected to a "shoe" or skid foot assembly which is pressurized against the bottom when the T-bar is pressurized against the top (T. 40-41, 70-71, 111-112; R-4; P-3). The ATRS has a "tilt" cylinder which facilitates its use on steep slopes such as are present at the mine in question (T. 102, 155-158; 192; R-4). It is designed to operate at an angle without binding (T. 72, 150-151, 192; P-3; R-4). Two hydraulic hoses run from the hydraulic system of the bolter to the ATRS (T. 96). There is a load check (safety) valve which is part of the ATRS cylinder itself (T. 40-41, 97-98, 146-147). Its function is to prevent hydraulic oil from flowing from the ATRS back to the bolter once the ATRS is pressurized (T. 42, 146-147, 181). 3/ Once the ATRS is pressurized, the hydraulic hoses to the ATRS can be removed without effect on the pressurization of the ATRS because of the presence of the load check valve (T. 74, 97-98, 146-147). The depressurization of the ATRS can only be effected by use of the controls on the bolter (Tr. 125).

When the Inspector and Mr. Hake arrived on the section and first viewed the ATRS, Inspector Montoya observed the boom of the ATRS to gradually drop from the roof approximately 4-5 inches (T. 41; Citation). The miners operating the bolter indicated to him that the ATRS was not operating properly (T. 47-8, 94). They demonstrated that by operating the ATRS and the bolter in a manner to cause the ATRS to come away from the roof suddenly by about 4-5 inches (T. 94-95, 129-132; Citation). At the face area where the bolter was being operated, there was approximately 12-14 inches of loose unconsolidated material (loose coal) on the bottom.

At Mr. Hake's direction, the bolter was taken out of service, and moved back away from the face area to an intersection where the roof was supported and where there was no soft material on the bottom; the ATRS was then pressurized against the roof (T. 47, 72-73, 82, 95-97). It did not come away from the roof, even during drilling operations, and the mechanics who inspected and tested it could find nothing wrong with it (T. 52-53, 73-74, 97-100, 145-146). The ATRS remained pressurized against the roof for 35 minutes (T. 97-99, 133). The hydraulic cylinder was marked and this indicated that no decompression of the hydraulic cylinder occurred at that time (T. 73-74). The

3/ The load check valve is a safety feature designed so that if a hose should burst or "something extraneous to the operation should happen", no oil would escape the cylinder. If oil should escape, this would allow the TRS beam against the roof to come down (T. 181).

hoses were disconnected from the ATRS and no hydraulic fluid ran out of the hoses, indicating that the check valve was functioning properly (T. 97-98, 146-147).

The bolter was again taken back into the face area (T. 81-82). Before this was done, it was explained to Inspector Montoya by maintenance foreman Darrell Sparks that the loose unconsolidated material on the bottom of the place might cause the ATRS to come away from the top (T. 81-82, 101, 151). There were gouges in the material, indicating that the ATRS foot had slid down when it was in the place previously (T. 151). The bolter was again pressurized against the roof and the hydraulic cylinder marked to indicate any movement which would indicate a loss of hydraulic pressure (T. 103-104, 137). While the marks on the cylinder did not indicate any decompression of the cylinder which would result from a loss of hydraulic pressure, the T-bar of the ATRS did come away from the roof on one side as the bolter was operated (T. 103-105).

The bolter was again taken out of the face area and back to an intersection (T. 105). In the intersection the ATRS was again pressurized against the roof for approximately 45 minutes and showed no signs of coming away from the roof (T. 107). Two minor oil leaks which had been observed by the Inspector (T. 48) were repaired. These leaks had nothing to do with the operation of the ATRS (T. 105-106). A pressure gauge was used to test the hydraulic pressure in the bolter but could not be used to test the ATRS itself (T. 106-107), 181-182).

The equipment involved (the bolter with ATRS attached) was mobile and was removed from service immediately upon issuance of the citation. (T. 11-13, 18-19).

The alleged violation was abated by replacing the ATRS hydraulic cylinder and was completed before the time set for abatement (T. 192; Citation).

The following week the hydraulic cylinder which was removed from the ATRS was tested by a private firm and found to show no evidence of "bleeding off" of hydraulic pressure or malfunction of the check valve (T. 81, 175-179; R-1).

Discussion and Ultimate Findings and Conclusions

Inspector Montoya, even at the hearing, was unable to say in precisely what respect the ATRS was not being maintained in safe

operating condition. 4/ His belief that it was unsafe or defective appears to be based on several factors. First, he testified that he saw the T-bar lower from the roof (T. 85). This occurred after he observed two roof-bolter operators pouring two 5-gallon cans of oil into the machine. He also observed patches of oil in the vicinity of the bolter, and that two hoses were leaking oil. From these observations and perhaps other factors, the Inspector apparently reached the conclusion that the hydraulic cylinder of the ATRS, which raised the T-bar (boom) of the ATRS upward to support the roof, was losing pressure, because of loss of oil pressure. The Inspector's precise thinking as to the mechanism which caused the purported malfunction was not convincingly articulated in his testimony. His most precise explanation for the T-bar's dropping was that: "It dropped because the - safety valve, the check valve, and the ATRS was not working properly" (Tr. 42) and "The cylinder leaked and the T-bar dropped" (T. 43). 5/

Respondent effectively and credibly rebutted the bases for Inspector Montoya's belief that the ATRS' hydraulic cylinder was losing pressure. For example, Respondent showed that the bolter "on a day to day basis" normally uses 30 gallons of oil and that the 10 gallons seen being put into the machine by the Inspector is a "small amount" (T. 153, 193-194). Respondent also established:

(1) That on October 3, 1985, the day before the Citation was issued, the ATRS and its load check valve was checked and found to be in good working order (T. 185).

(2) That the two oil "leaks" observed by the Inspector were not on the ATRS but on the bolter and that these leaks were not excessive, but a "dripping" (T. 152, 187).

4/ The Secretary failed to establish what, if anything, was wrong with the ATRS, or the hydraulic system generally. Various tests performed all showed there was nothing wrong with the safety (load check) valve or the cylinder. The Secretary's rebuttal witness, Inspector Kendzerski, after learning of the negative testing, could only point to the primary possibility of a defective valve as being the cause for the T-bar's dropping down.

5/ While the behavior of the ATRS provided a clear and legitimate basis for the Inspector's concern, and his sincerity is beyond question, comparison of the Inspector's qualifications and training with respect to the operation of hydraulic systems to those of Respondent's witnesses in such field indicates a higher degree of expertise on the part of Respondent's witnesses. Further, Respondent's three witnesses were clearly much the more knowledgable in the subject matters involved and such is reflected in even the most casual comparison of their testimony with that of the Inspector.

(3) That the ATRS and roof bolter were thoroughly tested two times on October 4, 1985, and it was not found to be malfunctioning, and more specifically, that there was no sign that oil was leaking from the ATRS cylinder (T. 96-107, 147, 181-182, 187).

(4) That shortly after the Citation was issued, the ATRS was taken to a local hydraulic shop, Craig Electric Motor and Machine, Incorporated, and it was examined, tested, and determined that it was not malfunctioning, and more specifically, that there was nothing wrong with the load check valve, or the cylinder (Ex. R-1; T. 175-183, 196).

(5) That the reason the T-bar dropped from the roof on the two occasions the Inspector saw it do so was due to the facts that:

(a) The roof bolter (to which the ATRS is attached) was sitting on 12-14 inches of loose coal, i.e. a soft bottom (T. 100, 113, 134-135, 151, 220, 222),

(b) Both times the T-bar was seen to drop the equipment was at the face sitting on loose coal (T. 41-42, 81-82, 100, 139-140, 151),

(c) The inherent capacity of the ATRS itself to raise the T-bar back to the roof automatically requires the operator to make certain adjustments when the bottom gives way under the ATRS (T. 215, 218, 222) and that the problem observed on October 4, 1985 was the result of the roof-bolter operator's failures (T. 138, 155-157, 169, 221-222).

(6) The problem of the T-bar's dropping down had been noted and diagnosed some two years earlier (T. 100, 139).

In this connection, Mr. Hake testified:

"When we first started roof-bolting at Empire a couple of years ago, we had had this same thing, same type of situation. People thought the ATRS was not working properly, and that's what we found out then, that if you didn't set - it was very important that when you did put the ATRS down that it was on solid footing, that if there was any loose material underneath it, that it may not stay snug up against the mine roof." (T. 100)

I am unable to conclude on the basis of the evidentiary record developed at the hearing herein that on the occasions observed by Inspector Montoya where the ATRS dropped or lowered from the roof such was a result of the equipment's "not being maintained in safe operating condition". Such a finding is necessary to a determination that the particular regulation cited by MSHA was infracted. Secretary v. Alabama By-Products Corporation, 4 FMSHRC 2128 (1982). In the final analysis, this matter called for resolution of a conflict between Respondent's version of what caused the 4-5 inch T-bar drop and that of Petitioner.

Both parties presented and relied on the opinions of their witnesses to carry the burdens of proof required by their respective positions. As above noted, the expertise and qualifications of Respondent's witnesses in this particular matter to render opinions as to the mechanical aspects of the ATRS and its behavior overwhelmed that of Petitioner's witnesses. Furthermore, Respondent's experts were generally more familiar with the equipment, the mine conditions and the past operation of the roof bolter than was the issuing inspector. Their testimony, when compared, reflects more detail and superior quality. For example, the Inspector saw significance in the fact that when he arrived on the scene, two 5-gallon cans of hydraulic fluid were being put into the machine. Yet, it appeared that the bolter would require some 30 gallons daily. While the Secretary's second witness, Alexander Kendzerski, had impressive qualifications to render an opinion as to operation and safety of the bolter (the ATRS system), his testimony was not based on direct knowledge, testing, or personal observation (T. 206). More importantly, the tenor of his testimony was speculative, i.e. the cause of the 4-5 inch drop "could" have been the relief valve (T. 201, 206, 208, 209, 214). Again, the issuing inspector reached the conclusion that something was wrong with the ATRS system based on circumstantial evidence, but he was unable to establish what actually was wrong or precisely in what respect the equipment was not "in safe operating condition".

Assuming arguendo that the event viewed by the Inspector, the 4-5 inch drop of the T-bar, posed a hazard to the miners working under it, it does not automatically or necessarily follow that it was caused by unsafe equipment or, more specifically, that the equipment itself was not in "safe operating condition". This is particularly true in view of the relative strength and probative value of Respondent's explanations for the drop, and its supportive explanations for the presence of splotches of oil observed by the Inspector on the floor area, and the necessity for replenishing hydraulic fluid in considerable quantity. Assuming that use of the ATRS in the circumstances extant at the time and place involved here was unsafe, the enforcement choice, issuance of a 104(d)(1) citation citing an infraction of 30 C.F.R. 75.1725(a) either will not, or cannot, achieve the remedial result sought by the Secretary. As previously indicated, various testing procedures performed both in the Inspector's presence and subsequently after the cylinder had been replaced for abatement purposes, disclosed no defects or malfunctioning.

On the basis of this evidentiary record, it has not been proved, nor can it be inferred, that the subject equipment was not in some respect being maintained properly, was otherwise defective, or, in the language of the regulation, not in "safe operating condition." It is concluded that the Secretary has failed to establish the violation charged by a preponderance of the reliable evidence.

ORDER

Citation No. 2207389 is VACATED.

Michael A. Lasher, Jr.
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 12 1986

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 86-180-R
	:	Order No. 2710945; 2/4/86
v.	:	
	:	Docket No. WEVA 86-181-R
	:	Order No. 2710946; 2/4/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 86-182-R
	:	Order No. 2710948; 2/4/86
	:	Docket No. WEVA 86-183-R
	:	Order No. 2710949; 2/4/86
	:	Docket No. WEVA 86-184-R
	:	Order No. 2710951; 2/4/86
	:	Docket No. WEVA 86-185-R
	:	Order No. 2710952; 2/4/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-257
	:	A. C. No. 46-01867-03677
v.	:	Blacksville No. 1 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Michael R. Peelish, Esq., Consolidation Coal Company, Pittsburgh, Pennsylvania, for Contestant/Respondent;
Linda M. Henry, Esq., Office of the Solicitor, U. S. Department of Labor, Philadelphia, Pennsylvania, for Respondent/Petitioner.

Before: Judge Maurer

STATEMENT OF THE CASE

Contestant Consolidation Coal Company (Consol) has filed notices of contest challenging the issuance of six separate orders which were all issued on February 4, 1986, at its

Blacksville No. 1 Mine. The Secretary of Labor (Secretary) has filed a petition seeking civil penalties in the total amount of $3,500 for the violations charged in the six contested orders. The proceedings have been consolidated for purposes of hearing and decision.

Pursuant to notice, the cases were heard in Morgantown, West Virginia, on August 12 and 13, 1986.

The general issues before me concerning each of the individual orders and its accompanying civil penalty petition are whether there was a violation of the cited standard, and, if so, whether that violation was "significant and substantial" and caused by the "unwarrantable failure" of the mine operator to comply with that standard as well as the appropriate civil penalty to be assessed for the violation, should any be found.

Both parties have filed post-hearing proposed findings of fact and conclusions of law, which I have considered along with the entire record herein. I make the following decision.

STIPULATIONS

The parties have agreed to the following stipulations, which I accept (Tr. I-4, I-5):

1. The Federal Mine Safety and Health Review Commission and this Administrative Law Judge have jurisdiction to hear this case.

2. Blacksville No. 1 Mine is owned and operated by the respondent, Consolidation Coal Company.

3. The subject orders were properly issued upon the respondent by a duly authorized representative of the Secretary of Labor.

4. 1985 annual production for Consolidation Coal Company's Blacksville No. 1 Mine was 1,609,803 tons of coal.

5. Consolidation Coal Company has a history of 681 assessed violations for the two years preceding the issuance of the orders at issue.

6. Since the issuance of 104(d)(1) citation 2259064 on January 16, 1984, there has been no clean inspection at the Blacksville No. 1 Mine. Thus, this mine was still on a 104(d)(2) chain at the time of the issuance of the orders involved.

7. Payment of the civil penalties assessed in this matter will not affect the operator's ability to stay in business.

8. The operator has abated the conditions cited in good faith.

9. None of these conditions constituted an imminent danger. No imminent danger orders were issued at the time.

10. The exhibits to be entered into evidence in this case are authentic copies of the originals.

I. DOCKET NO. WEVA 86-180-R; ORDER NO. 2710945

Order No. 2710945, issued pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the Act), alleges a violation of the regulatory standard at 30 C.F.R. § 75.1403 1/ and charges as follows:

> Beginning at a point approximately 60 feet outby the portal bus track switch on the portal bottom and extending into the portal bus track for approximately 37 feet the clearance space had become obstructed on the wire side with loose rock. This area had been heavily rockdusted several shifts earlier thus depositing such dust on the loose rock. This indicates this obstruction had existed several shifts. In addition equipment that had been passing in this area had plowed a deep groove through the accumulation making it very obvious with or without equipment being present. At a point 16" inches from the rails, the portal bus had grooved the material. This area is visited several times each day by managing officials who should have observed this condition.

FINDINGS OF FACT

1. The order was issued at 8:35 a.m. on February 4, 1986, by MSHA Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

1/ 30 C.F.R. § 75.1403 provides as follows:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

2. During this inspection, Inspector Migaiolo observed that beginning at a point approximately 60 feet outby the portal bus track switch on the portal bottom and extending along the portal bus track there were "obstructions" in the clearance space on the wire side for approximately 37 feet. These "obstructions" consisted of oil shale which had sloughed off from the rib adjacent to a curve in the portal bus track.

3. It is obvious that this loose material had been there for some time because several layers of rock dust had been intermingled in the accumulation of shale and track-mounted equipment had plowed a groove through the debris. Moreover, two of Consol's certified firebosses, Messrs. Turner and Casteel, had admittedly been watching the accumulation of sloughage, presumably patiently waiting for the proper time to clean it up. In fairness, they were of the considered opinion that the condition, as it existed on February 4, 1986, did not at that time constitute a hazard.

4. A notice to provide safeguards regarding clearance space on track haulage had been previously issued at this mine on November 4, 1977. This safeguard essentially stated that the clearance space on all track haulage should be kept free of loose rock, supplies and other loose materials.

5. Vehicles travel this stretch of haulage daily and conceivably there could be and are situations that arise which would cause miners to stop in this area and alight from their equipment. It is also likely that an individual walking in the area where these materials had accumulated could slip and fall and thus injure himself. However, the accumulation of loose material existed on the wire side or tight side of the track haulage, underneath the hot trolley wire. If a person were to alight from his vehicle and walk in this area, I find it most likely that because of the greater clearance available on the opposite side and in order to stay out from under the hot wire, he would walk on the clearance side of the haulage. I find the testimony of Mr. Gross in this regard to be completely credible and unrebutted.

CONCLUSIONS OF LAW

1. Consol is subject to the provisions of the Act in the operation of the subject mine and I have jurisdiction over the parties and subject matter of this proceeding. [This finding applies to all the orders considered in this proceeding.]

2. The evidence as found in the above Findings of Fact establishes the existence of a previously issued safeguard concerning the subject matter of the instant order and the failure of the operator to comply with same in that the clearance space on the wire or tight side of the track haulage in the affected area was not kept clear as required by the safeguard. Rather, an accumulation of oil shale sloughage was allowed to build up to the point where the equipment going by had admittedly been cutting a groove through the sloughage to pass. Clearly, the operator failed to comply with the issued safeguard and thereby violated 30 C.F.R. § 75.1403.

3. The issue of whether or not the violation was of such a nature as could significantly and substantially contribute to the cause of a coal mine safety hazard presents a more difficult question.

The Commission has held that a violation is properly designated significant and substantial if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission subsequently explained that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury" U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984).

In the instant case, it is established that a violation occurred, and that the violation contributed to a discrete safety hazard that could contribute to an injury if a miner would disembark in the accumulated loose material. It is the third element of the Mathies formula which the Secretary has failed to prove up. Although I agree that if

miners were required to disembark in such materials, it is reasonably likely that someone might sustain a slip and fall type injury, the Secretary has presented no credible evidence to support his conclusion that in those isolated instances where miners would be forced to disembark on this particular stretch of haulage, they would do so on the wire side rather than the patently more convenient, considerably wider, and obviously safer clearance side. In fact, as alluded to in Finding of Fact No. 5, the credible evidence is to the contrary. Accordingly, I cannot conclude that the Secretary has established that there was a reasonable likelihood that an accident or injury would occur. Therefore, the inspector's "significant and substantial" finding is vacated and the order is modified to reflect a "non-S&S" violation.

4. Nonetheless, I find that the violation was caused by the "unwarrantable failure" of the operator to comply with the standard.

In Zeigler Coal Company, 7 IBMA 280 (1977), the Interior Board of Mine Operations Appeals interpreted the term "unwarrantable failure" as follows:

> An inspector should find that a violation of any mandatory standard was caused by an unwarrantable failure to comply with such standard if he determines that the operator has failed to abate the conditions or practices constituting such violation, conditions or practices the operator knew or should have known existed or which it failed to abate because of lack of due diligence, or because of indifference or lack of reasonable care.

The Commission has concurred with this definition to the extent that an unwarrantable failure to comply may be proven by a showing that the violative condition or practice was not corrected or remedied prior to the issuance of a citation or order, because of indifference, willful intent, or serious lack of reasonable care. United States Steel Corp. v. Secretary of Labor, 6 FMSHRC 1423 at 1437 (1984).

Herein, it is indisputable that knowledge of the violative condition as it existed at the time the order was issued had been within the knowledge of the operator for some time. Even if management didn't feel it was a particularly hazardous condition, the operator is still chargeable with the knowledge that it was a violative condition in light of the safeguard on record. Therefore, I find their inaction in cleaning up this debris to be a serious lack of reasonable care to see that the violative condition was abated in a timely fashion.

5. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $300 is appropriate.

II. DOCKET NO. WEVA 86-181-R; ORDER NO. 2710946

Order No. 2710946, issued pursuant to section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. § 75.1403 and charges as follows:

> The north side crossover track switch shelter hole was not being maintained free of loose rock (pieces 12" x 8" x 3" and several pieces 7" x 11" x 2" and loose shale 6-8" in depth). In addition the depth of the hole was only 35" near its middle (height of the coal 4' wide x 5' in depth is required). A board 36" long x 4" wide x 5/8" was also in the shelter hole. This condition is obvious and as such has existed for several shifts. Management frequently passes this area and thereby should have had observed and recorded this shelter hole obstruction and construction.

FINDINGS OF FACT

1. The order was issued at 9:16 a.m. on February 4, 1986, by Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. At this time, Inspector Migaiolo observed the north side crossover track switch shelter hole in a condition that did not meet the criteria for shelter holes contained in 30 C.F.R. § 75.1403-9. That section provides, inter alia, that shelter holes should be at least 5 feet in depth, not more than 4 feet in width, and at least the height of the coal seam or 6 feet, whichever is less. It also provides that shelter holes should be kept free of refuse and other obstructions.

3. Inspector Migaiolo observed this particular shelter hole to be obstructed with 6 to 8 inches of loose rock on the floor. Most importantly, however, instead of the shelter hole being 5 feet deep, as required, it was only 34 inches deep in its center because of a protruding rock at the rear of the shelter hole. Even though Mr. Gross disputed the particular place the inspector took the measurement from in order to arrive at the 34 inch depth, he conceded during his direct examination that the condition of the shelter hole was in violation of the mandatory standard.

4. A notice to provide safeguards regarding shelter holes had been previously issued at this mine on November 21, 1984. This safeguard essentially stated that all switch throws should be provided with shelter holes. Implicit in that requirement is that all shelter holes provided in compliance with the safeguard should meet the criteria for shelter holes contained in the mandatory standard at 30 C.F.R. § 75.1403-9.

5. Since this shelter hole is located at a track switch, the speed of track-mounted equipment past this area is relatively slow. However, track-mounted equipment can and does derail even if it is moving at a slow walking pace. Derailment of equipment which is carrying supplies or any other material could cause that material to become an airborne projectile with sufficient velocity to cause serious injury should someone be struck.

CONCLUSIONS OF LAW

1. On February 4, 1986, the operator violated 30 C.F.R. § 75.1403 in that the north side crossover track switch shelter hole did not meet the criteria for a shelter hole contained in 30 C.F.R. § 75.1403-9 as more fully set out in the Findings of Fact.

2. This violation was of such a nature as could significantly and substantially contribute to the cause and effect of a coal mine safety hazard. In order to make an "S&S" finding, the Secretary must prove a violation, a discrete safety hazard, a reasonable likelihood that the hazard will result in injury and that the injury will be of a reasonably serious nature. Mathies Coal Company, supra.

Herein, I have already found the violation. The safety hazard is that given the fact that shelter holes are designed to protect miners from derailed equipment and airborne projectiles off of that equipment, a shelter hole of insufficient depth [34 inches vice 5 feet] is a serious derogation of the protection a miner would have in the case of a nearby derailment. During such a derailment, it is reasonably likely that any material or supplies being carried by the rail-mounted equipment would become airborne debris traveling with sufficient velocity to cause serious injury if a miner should be struck. Further, it is much more likely that a miner would be struck by such debris if the shelter hole in which he had taken refuge was less than the required 5 foot depth, as here.

3. An "unwarrantable failure" exists where the evidence establishes the failure of an operator to abate

conditions constituting violations of a mandatory standard because of a lack of due diligence, indifference, or a serious lack of reasonable care. Zeigler Coal Co., supra; U. S. Steel Corp., supra.

In the instant case, management demonstrated a serious lack of reasonable care in locating this violative condition and abating it. The pre-shift examiner, Turner, testified that he may not have even glanced into this shelter hole on the morning of Inspector Migaiolo's visit. Furthermore, both he and Mr. Gross, a management employee, the safety supervisor in fact, testified to the effect that they look at a shelter hole with an eye toward determining if there is anything that would prevent somebody from getting into it or something which would cause somebody to be injured while in it. Mr. Turner further opined that he "didn't have any call to measure it."

Therefore, I find that the operator displayed indifference to the criteria required for shelter holes that is contained in the regulations and demonstrated a serious lack of reasonable care in discovering and abating this violation.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $400 is appropriate.

III. DOCKET NO. WEVA 86-182-R; ORDER NO. 2710948

Order No. 2710948, issued pursuant to section 104(d)(2) of the Act, alleges a violation of 30 C.F.R. § 75.1403 and charges as follows:

> Crosscuts being used as shelter holes in the south and north archways on the crossover track haulage were not being maintained free of loose rock for a distance of 15 feet and 4 feet wide (proper measurements at this mine). In this north side shelter hole, rib and roof sluffing had accumulated loose shale to a depth of 24 inches and a width of approximately 31 inches and length of approximately 15 feet. On this south side shelter hole, loose rock had distributed over the shelter hole floor for a distance of 15 feet depth. These two shelter holes had obvious conditions which should easily have been observed by management.

FINDINGS OF FACT

1. The order was issued at 10:40 a.m. on February 4, 1986, by MSHA Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. There is a serious dispute between the parties as to whether the cited areas were in a crosscut being used as a shelter hole in the north and south archways on the crossover track haulage or were shelter holes that existed in the immediate area behind the cutout portions in the archways independently of the crosscut that happened to be behind them. The only significance this fact has in the final determination of whether a violation occurred is whether the area must be clear of obstructions for a depth of 15 feet in the case of a crosscut or only 5 feet in the more general case of a shelter hole.

3. The entire area in the proximity of the shelter holes was arched. The archway is constructed of steel arch straps with boards in between the straps that act as the walls of the archway. The dimensions of the cutout portions of the archway constituting the shelter hole entrances are 4 feet by 4 feet and the level of the shelter holes is about 10 to 12 inches above the level of the track entry. There indisputably was a crosscut behind the arches.

4. On June 6, 1972, a notice to provide safeguards was issued at the Blacksville No. 1 Mine requiring that all crosscuts being used as shelter holes be kept free of refuse and materials for a distance of 15 feet.

5. I specifically find that the area described in Government Exhibits Nos. 7 and 9 as the situs of the violative conditions is a crosscut within the meaning of the safeguard which is Government Exhibit No. 8, albeit a substantially modified crosscut which could cause reasonable men to differ as to the applicability of the instant safeguard.

6. At the time of Inspector Migaiolo's observation of the violative condition, rib and roof sloughage and loose shale had accumulated to a depth of 24 inches in an area approximately 31 inches wide and 15 feet deep into the north side shelter hole. Also the area through the arch, in the crosscut, was littered with materials such as spalling ribs and large rocks that had fallen from the roof cavity. Furthermore, large rocks which had fallen out of the roof cavity area more fully described in Government Exhibit No. 9 were lying loose on top of the arch across the archway. These rocks, of which there were several, were approximately 12 cubic feet in size. In the south side shelter hole, the walkway was littered with scattered debris.

7. Mr. Gross, the Safety Supervisor at the mine, acknowledges that the northside portion of the cited area

was in violation of the shelter hole criteria because the "manhole was not 4 foot wide and 5 foot deep". However, he disputes that this area is covered by the safeguard because the whole area is arched and is therefore no longer a crosscut within the meaning of the safeguard. Essentially then, Mr. Gross, on behalf of the operator, concedes that a violation occurred because the shelter hole was not cleaned out to a depth of 5 feet but disputes whether it should have been cleaned out 10 feet further back to a depth of 15 feet.

8. I find that since the safeguard applies to the shelter holes, by its terms, they must have been cleaned out to a depth of 15 feet in order to be in compliance with the mandatory standard.

9. The largest equipment that would be traveling through this entry is a 20-ton motor and it would be moving through this area at a relatively slow rate of speed. I find that in the event of a derailment in this area, it would be unlikely that the equipment itself would enter the shelter holes and injure individuals inside the arches. However, if the equipment crashed into the archway, debris such as the large rocks on top of the arch very likely would have fallen into the northside shelter hole. These rocks were of sufficient size to severely injure someone had they been struck. There likewise existed slip, trip, and fall hazards within the shelter holes because of floor debris.

CONCLUSIONS OF LAW

1. The evidence as found in the above Findings of Fact establishes the existence of a previously issued safeguard concerning the subject matter of the instant order and the failure of the operator to comply with the same in that the subject crosscut, being used as a shelter hole, was not kept clear of refuse and debris for a distance of 15 feet. Therefore, the operator failed to comply with the issued safeguard and thereby violated 30 C.F.R. § 75.1403.

2. In the event of a derailment of track-mounted equipment in the proximity of this archway in the crosscut, I find that it is reasonably likely that if the archway were struck, even at a relatively slow speed, loose flying debris could seriously injure persons taking shelter in the crosscut/shelter hole. Therefore, I conclude that the violation contributed to a measure of danger to safety reasonably likely to result in serious injury to miners. Mathies Coal Co., supra. I therefore further conclude that the violation was significant and substantial.

3. The violation was not the result of Consol's unwarrantable failure to comply with the safeguard cited.

Consol's position with regard to the applicability of the cited safeguard is that the normal crosscut at this mine is approximately 13-1/2 to 15 feet wide, depending on the type of miner used to cut it. The crosscut herein involved was substantially modified by an archway down to two shelter hole entrances that are 4 feet by 4 feet. Their reasoning goes that the purpose for the safeguard is to protect miners against a derailed piece of equipment getting into the crosscut and therefore the shelter hole. Should this occur, it could be necessary to get 15 feet deep into the crosscut in order not to be struck by the equipment itself. Here, however, the equipment itself could not get into the crosscut because of the steel and wood archway. Therefore, they reasoned that the safeguard does not apply to these shelter holes in the archway and thus it follows that the shelter holes should not have to be kept clear of obstructions to a depth of 15 feet.

This is not an unreasonable position, but I have found it to be in error. The archway and shelter holes had existed in that configuration for at least 12 years. During this extended period of time, no one had ever before suggested that this particular safeguard applied to this configuration of crosscut/shelter hole. Nor had any other MSHA inspector ever required that it be kept clear of obstructions to a depth of 15 feet. In fact, on the day the order was issued, the testimony was to the effect that Inspector Migaiolo and his supervisor had some difficulty deciding themselves whether the area should be cleared of obstructions for 5 feet or 15 feet.

The Commission interprets the term "unwarrantable failure to comply" as being a violative condition which resulted from indifference, willful intent, or a serious lack of reasonable care. U. S. Steel Corp., supra. From the totality of evidence in this record, I cannot conclude that the instant violation resulted from Consol's indifference, willful intent, or a serious lack of reasonable care. Even though the rock found by the inspector in these shelter holes had obviously accumulated over a period of days or even weeks, the operator had a reasonable basis for disbelieving that the cited safeguard applied to this hybrid type of crosscut.

Therefore, I find that the instant order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory standard, i.e., the safeguard issued on June 6, 1972, by Inspector Powers.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $300 is appropriate.

IV. DOCKET NO. WEVA 86-183-R; ORDER NO. 2710949

Order No. 2710949, issued pursuant to section 104(d)(2) of the Act alleges a violation of the regulatory standard at 30 C.F.R. § 75.1403 and charges as follows:

> On the south side of the crossover track haulage, shelter holes were not being maintained at least every 105 feet. Beginning at the first shelter inby the manway the next shelter hole was approximately 205 feet away. This area is traveled at least three times a day by management officials and as such should have been identified that shelter hole spacing was not proper. An overcast was present in the related area.

FINDINGS OF FACT

1. The order was issued at 11:10 a.m. on February 4, 1986, by Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. Inspector Migaiolo observed, representatives of Consol essentially admitted, and I so find as a fact that shelter holes had not been provided every 105 feet in the crossover track haulage of the subject mine. More particularly, the inspector located an area, 205 feet in length, that did not contain a shelter hole.

3. On January 26, 1981, a notice to provide safeguards was issued for this mine concerning shelter holes. This safeguard essentially stated that shelter holes shall be provided on track haulage at intervals of not more than 105 feet.

4. Considering the fact that this condition had existed since at least January of 1981, management personnel at Consol are certainly chargeable with the knowledge that the condition co-existed with the safeguard that forbade it.

5. If equipment operating in this area were to derail, persons in the area would not have a shelter hole available and could be crushed by the equipment. Furthermore, the same reasoning as is contained in Finding of Fact No. 5 in Section II, supra, applies equally as well here where there is no shelter available.

CONCLUSIONS OF LAW

1. On February 4, 1986, the operator violated 30 C.F.R. § 75.1403 in that the evidence of record establishes the

existence of a previously issued safeguard concerning the subject matter of the instant order and the failure of the operator to comply with the same in that there was no shelter hole for a length of 205 feet along the crossover track haulage of the subject mine. The safeguard required a shelter hole at least every 105 feet along the haulage. By failing to comply with the issued safeguard, the operator thereby violated 30 C.F.R. § 75.1403.

2. I find the violation contributed a measure of danger to safety reasonably likely to result in serious injury to miners. The rationale contained in Conclusion of Law No. 2 in Section II, supra, applies equally to this order and violation.

3. I likewise find the violation was the result of Consol's unwarrantable failure to comply with the mandatory standard, i.e., the safeguard of January 26, 1981. Management personnel at Consol knew or should have known that the violative condition and the safeguard forbidding that condition had co-existed at this mine for more than 5 years at the time the order was written.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $500 is appropriate.

V. DOCKET NO. WEVA 86-184-R; ORDER NO. 2710951

Order No. 2710951, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.202 2/ and charges as follows:

> In a large roof cavity on the south side crossover an unsupported roof brow existed. On the north end of the cavity a brow approximately 24 inches thick, 30 inches wide, and 18 inches long was suspended over the walkway. This brow has come about due to roof sluffing around a conventional roof bolt. Three sides of this roof brow are exposed to air in that a roof strap was holding the fourth side together. This condition should have been observed easily due to location over the walkway and deteriorated form of roof unconsolidated shale. Management travels this area at least three times each day for examination and should have observed the condition.

2/ 30 C.F.R. § 75.202 provides in pertinent part: Loose roof and overhanging or loose faces and ribs shall be taken down or supported.

FINDINGS OF FACT

1. The order was issued at 11:25 a.m. on February 4, 1986, by Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. Inspector Migaiolo issued the instant order when he observed a roof brow approximately 24 inches in thickness to the main roof, 30 inches wide at the top and 18 inches at the base on the north end of the cavity at the south side crossover. The pillar of rock, consisting of oily shale type material is shown in a sketch admitted into evidence in this proceeding as Government Exhibit No. 15. The column of rock was at the end of an unsupported steel plank. The roof bolt on that end was no longer attached to the steel plank, having pulled through, and therefore the column of rock was lying on top of the plank on that end. The brow, consisting of unconsolidated oily shale, had deteriorated by erosion on three sides; only the right side was still attached to the main roof.

3. This eroded roof condition had existed for at least several days, if not weeks, as it takes this long for the roof to deteriorate to the point where Inspector Migaiolo found it on February 4. In fact, Messrs. Turner and Casteel had been watching this area for several weeks. Turner had tested the area by sounding it with a 7 foot roof bolt on the very morning the order was issued as part of his pre-shift examination. Company personnel considered the brow to be tight and adequately supported. I disagree. However, the one roof bolt that had popped out of the steel roof strap could have popped out at any time prior to Migaiolo's inspection.

4. Individuals regularly travel through this area for supplies, clean-up procedures, and pre-shift examinations at least once a shift, three times a day.

5. The condition was abated by removing the brow and installing two roof bolts.

CONCLUSIONS OF LAW

1. On February 4, 1986, the operator violated 30 C.F.R. § 75.202 by its failure to either take down or adequately support this roof brow.

2. Whether that violation was "significant and substantial" depends on whether based on the facts surrounding the violation, there existed a reasonable likelihood that the hazard contributed to would have resulted in an injury of a reasonably serious nature. Cement Division, National

Gypsum Co., supra. Obviously, falls of roof material can result in serious or even fatal injuries. It is indisputable that roof falls are the leading cause of coal mining fatalities. In the instant situation, I find it to be reasonably likely that the fall of the relatively small area of unsupported roof brow could have caused a serious injury to a miner who would have happened to be walking underneath it, should it have come down at that time. I further find it to be reasonably likely that the unsupported roof brow as described in the record herein could have come down at any time. I fully credit the opinion testimony of Inspector Migaiolo in this regard.

3. The violation was not, however, the result of Consol's unwarrantable failure to comply with the mandatory standard. Inspector Migaiolo's own testimony on cross-examination effectively negates his own finding of unwarrantability. The following exchange, as pertinent to this finding, took place at Tr. I-147, 148:

> Q. You stated that the roof bolt straps, the one strap was, that the bolt had popped out of it, so to speak?
>
> A. Yeah, that's right.
>
> Q. ... the fact that this could occur instantly, would that negate the unwarrantability of this condition?
>
> A. Yes.
>
> Q. Okay. And you did state that that could occur instantly, that the bolt could pop out?
>
> A. Yes.

Furthermore, responsible personnel at Consol testified that they were well aware of the deteriorated roof condition in this area and were testing it by attempting to pull it down and sounding it for looseness. They testified and I find their testimony credible to the extent that they found the roof to be tight and secure in their opinion. I disagree with their conclusion that the area was adequately supported and accordingly have found a violation of the standard cited, but I cannot conclude that the violation occurred as the result of Consol's "unwarrantable failure to comply" with that standard.

4. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $450 is appropriate.

VI. DOCKET NO. WEVA 86-185-R; ORDER NO. 2710952

Order No. 2710952, issued pursuant to section 104(d)(2) of the Act, alleges a violation of the regulatory standard at 30 C.F.R. § 75.303 3/ and charges as follows:

> An inadequate preshift examination was performed of the portal bus spur located on the portal bottom and crossover track haulage north and south sides. Such examination was inadequate for all three shifts. Obvious conditions noted in these areas as issued are as follows: 104(d)(2) Orders on 2/4/86 (1) 2710945, (2) 2710946, (3) 2710948, (4) 2710949, (5) 2710951. Such conditions in sequence were (1) obstructed clearance space in portal bus spur on bottom, (2) obstructions and unsized shelter hole at north end crossover switch, (3) obstructions in crosscuts used as shelter holes on north and south sides of bottom crossover track haulage, (4) shelter holes not spaced every 105' on south side of crossover track haulage, (5) roof brow inadequately supported on south side of crossover track haulage. An adequate examination shall be performed and recorded.

3/ 30 C.F.R § 75.303 provides in pertinent part:

> (a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine...and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried.... Such mine examiner shall place his initials and the date and time at all places he examines. If such mine examiner finds a condition which constitutes a violation of a mandatory health or safety standard or any condition which is hazardous to persons who may enter or be in such area, he shall indicate such hazardous place by posting a "danger" sign conspicuously at all points which persons entering such hazardous place would be required to pass, and shall notify the operator of the mine.... Upon completing his examination, such mine examiner shall report the results of his examination to a person, designated by the operator to receive such reports at a designated station on the surface of the mine, before other persons enter the underground areas of such mine to work in such shift. Each such mine examiner shall also record the results of his examination...in a book approved by the Secretary kept for such purpose.

FINDINGS OF FACT

1. The order was issued at 12:10 p.m. on February 4, 1986, by MSHA Inspector Joseph Migaiolo during an inspection of the Blacksville No. 1 Mine.

2. I find as a fact that the inadequate pre-shift violation charged in this order is duplicative of that previously charged in Order Nos. 2710945, 2710946, 2710948, 2710949, and 2710951 in the following respects:

a. Order No. 2710945 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "This area is visited several times each day by managing officials who should have observed this condition."

b. Order No 2710946 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "Management frequently passes this area and thereby should have had observed and recorded this shelter hole obstruction and construction."

c. Order No. 2710948 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "These two shelter holes had obvious conditions which should easily have been observed by management."

d. Order No. 2710949 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "This area is traveled at least three times a day by management officials and as such should have been identified that shelter hole spacing was not proper."

e. Order No. 2710951 charged the operator, inter alia, with inadequate pre-shifting. The pertinent portion of that order stated: "Management travels this area at least three times each day for examination and should have observed the condition."

3. In the previous five numbered sections of this decision I have discussed and made findings of fact and conclusions of law concerning all the facts alleged in the five previous orders and have found violations in each of the five. Additionally, I have made findings and conclusions concerning the seriousness of these violations, and unwarrantability and have considered all the statutory criteria in arriving at an appropriate civil penalty. As part and parcel of this process, I have necessarily considered and made findings concerning the operator's negligence in either failing to locate or failing to appreciate the seriousness

of the particular hazard involved. In essence the five previous orders charged the operator with failure to locate and abate certain violative conditions. I have considered those charges in their totality and have made the necessary findings which I feel are justified in the record.

Order No. 2710952 adds nothing to the case from a factual standpoint. The facts are exactly identical to those the operator is charged with in the five previous orders. The only new issue raised in the instant order is a violation of 30 C.F.R. § 75.303 as a separate violation arising out of the same facts. Since these facts have already been adjudicated and appropriate penalties arrived at in the five previous sections, I find Order No. 2710952 to be multiplicative for purposes of findings and penalties.

CONCLUSIONS OF LAW

1. Because the factual allegations contained in Order No. 2710952 are duplicative of those charged earlier in Order Nos. 2710945, 2710946, 2710948, 2710949, and 2710951, and penalties have already been assessed herein for the violative conditions charged, Order No. 2710952 will be vacated. 4/

DISCUSSION WITH FURTHER FINDINGS

Consol repeatedly raised the issue during the hearing that the (d)(2) orders which are the subject of this decision were somehow tainted by the fact that this same inspector, Migaiolo, or even other unnamed inspectors, on one or more prior occasions had walked right past these cited conditions without batting an eye, let alone writing a (d)(2) order. A second issue frequently raised was that Inspector Migaiolo's supervisor, one Paul Mitchell, was accompanying the inspector on this day and that but for his presence, Migaiolo would either not have written the violations at all or at least would not have characterized them as "unwarrantable." The first is a legal issue, the latter a factual allegation that simply fails of proof.

Consol's legal argument essentially amounts to some form of estoppel. The argument at the hearing was along the lines that if one inspector observed a certain condition and

4/ Conclusions of law concerning the violation of 30 C.F.R. § 75.303, per se, were not made in the previous five numbered sections of this decision because a violation of that section was not formally charged in those orders, even though the language contained therein as set out in Finding of Fact No. 2 in fact did allege violations of that section as well as the substantive section actually specified.

didn't say anything about it one way or the other and the next day when basically the same condition existed, a second inspector wrote an unwarrantable violation order on it, that because of the operator's reliance on the first inspector, at least the unwarrantable portion of the order should not be upheld.

In their post-hearing brief, Consol has softened that position considerably and in fact provided the U.S. Court of Appeals citation in Emery Mining Corp. v. Secretary of Labor, 5/ which effectively negates the estoppel argument. Therein the court stated "courts invoke the doctrine of estoppel against the government with great reluctance." Further, quoting from Heckler v. Community Health Services, 104 S. Ct. 2218 (1984), at 2226 the court stated that as a general rule "those who deal with the Government are expected to know the law and may not rely on the conduct of government agents contrary to law."

Consol goes on to state that subjective interpretation of the regulations by inspectors is improper, and that allowing inconsistencies to exist in the interpretation of the rules and regulations from one inspection or inspector to the next defeats the purpose of the Act and makes it difficult if not impossible for operators to comply.

While I agree that an objective, if not absolutely identical, on the spot analysis of every factual condition and regulation would be an ideal situation, I don't think it is possible given the fact that MSHA inspectors are human and many of the regulations they are charged with enforcing are themselves subjective in nature.

I therefore find that each order must stand on its own. All the relevant facts surrounding the cited conditions and the circumstances of its issuance were admitted into the record and the parties given the opportunity to argue what inferences and conclusions should be drawn therefrom. The fact that another inspector, or even the same inspector, previously observed but did not cite a particular violation on a previous occasion is one of those relevant facts but is not by itself determinative of whether the order should be affirmed.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Order No. 2710945, contested in Docket No. WEVA 86-180-R, IS AFFIRMED as a non-S&S violation of 30 C.F.R. § 75.1403. Further, the order properly concluded that the

5/ 3 MSHC 1585 (10th Cir. 1984).

said violation resulted from Consol's unwarrantable failure to comply with the standard involved.

2. Order No. 2710946, contested in Docket No. WEVA 86-181-R, properly charged a violation of 30 C.F.R. § 75.1403 and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2710946 IS AFFIRMED.

3. Order No. 2710948, contested in Docket No. WEVA 86-182-R, properly charged a violation of 30 C.F.R. § 75.1403 and properly found that the violation was significant and substantial. However, the contested order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a section 104(d)(2) order. Accordingly, Order No. 2710948 IS HEREBY MODIFIED to a § 104(a) citation.

4. Order No. 2710949, contested in Docket No. WEVA 86-183-R, properly charged a violation of 30 C.F.R. § 75.1403 and properly found that the violation was significant and substantial and resulted from Consol's unwarrantable failure to comply with the standard involved. Accordingly, Order No. 2710949 IS AFFIRMED.

5. Order No. 2710951, contested in Docket No. WEVA 86-184-R, properly charged a violation of 30 C.F.R. § 75.202 and properly found that the violation was significant and substantial. However, the contested order improperly concluded that the violation resulted from Consol's unwarrantable failure to comply with the mandatory safety standard involved. Therefore, the violation was not properly cited in a section 104(d)(2) order. Accordingly, Order No. 2710951 IS HEREBY MODIFIED to a § 104(a) citation.

6. Order No. 2710952, contested in Docket No. WEVA 86-185-R, IS VACATED.

7. The Consolidation Coal Company IS HEREBY ORDERED TO PAY a civil penalty of $1,950 within 30 days of the date of this decision.

Roy J. Maurer
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

DEC 16 1986

JOHNNIE J. DELGADO, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. CENT 86-124-DM
v.	:	MD 86-22
	:	
BARRETT INDUSTRIES, INC., Respondent	:	Barrett Base Plant

DECISION

Appearances: Mr. Johnnie J. Delgado, San Antonio, Texas, pro se.;
Mr. Franklin Spradling, Barrett Industries, San Antonio, Texas,
for Respondent.

Before: Judge Morris

Complainant brings this action on his own behalf alleging he was discriminated against by his employer, Barrett Industries, Inc., in violation of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the "Act").

The statutory discrimination provision, Section 105(c)(1) of the Act, now codified at 30 U.S.C. § 815(c)(1), provides as follows:

> § 105(c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

After notice to the parties, a hearing on the merits was held in San Antonio, Texas on September 18, 1986. The parties waived their right to file post-trial briefs.

Applicable Case Law

In order to establish a prima facie case of discrimination under section 105(c) of the Mine Act, a complaining miner bears the burden of production and proof to establish that (1) he engaged in protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not in any part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Robinette, 3 FMSHRC at 818 n. 20. See also Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983); Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984)(specifically approving the Commission's Pasula-Robinette test). The Supreme Court has approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-403 (1983).

Summary of the Evidence

Johnnie J. Delgado was terminated by Barrett Industries on February 7, 1986 (Tr. 8, 9). At the time he was the operator of a 988A Caterpillar loader. He was working 50 hours and earning $5.40 per hour (Tr. 9, 10).

On the date of his termination Delgado was going to have lunch with his wife at lunch time. When he learned his wife was at the parking lot another operator said he would load the truck while Delgado went to eat. Due to the nature of the business the workers do not have a regular lunch period (Tr. 10-13, 26, 27).

Mr. Delgado started eating and Bob Dixon, the plant supervisor, signaled him to go back to work. When Delgado signaled he was eating Dixon restated that he wanted Delgado to load the

trucks "right now". Delgado asked if he should go out and eat dust. Dixon replied affirmatively. Delgado said he wouldn't eat in the dust (Tr. 10, 12, 14). Delgado said he'd go back to work right quick, that is, in about five minutes, as soon as he finished eating (Tr. 14).

Delgado finished eating and walked down to his Caterpillar. Dixon had gotten another operator to drive the loader. Dixon then told Delgado that he was terminated (Tr. 11, 14-16, 27).

Everytime Delgado had talked about safety to Mr. Barrett or Frank Spradling, Bob Dixon would yell at him for talking to them (Tr. 11). After he was fired Delgado talked to Mr. Barrett who told him he couldn't do anything (about him having been fired) (Tr. 17, 18).

It it always dusty in the pit area, particularly where the material comes on the conveyor from the shaker and into the pile (Tr. 18).

About a month before he was fired Delgado had complained that his machine was leaking too much oil. He had also complained (at some undetermined time) about carbon monoxide leaking from the corroded exhaust (Tr. 19). No one at Barrett said he shouldn't complain about his equipment or anything of that nature (Tr. 19). The company didn't seem upset when he complained about the oil leak or the manifold (Tr. 20). In December 1985 Delgado had complained to his supervisor Rodrigues about the safety of the workers he was lifting in the loader bucket. They were raised to place pins in the crusher (Tr. 20-22). The company was not upset over the bucket incident (Tr. 22, 23).

Due to a back injury in November 1985, Delgado has not worked since he was terminated. The doctor released him two months ago (Tr. 24). Delgado considered himself a good employee (Tr. 24).

Franklin Spradling, director of safety, testified for Barrett Industries (Tr. 30). The witness, who was not present on February 7, 1986, testified that the company crushes limestone (Tr. 30, 31).

Delgado's job was at the pile where he would load customer's trucks (Tr. 31). Three times supervisor Dixon asked Delgado to return to work. When he would not return Dixon got another operator to perform the work (Tr. 31). About four or five workers are trained for that job (Tr. 32).

The company does not have a prescribed lunch period (Tr. 31). Other than clarifying the lunch policy, the witness had no

problem with anything Delgado had stated (Tr. 31). He felt Delgado should have stayed on his job until he was relieved (Tr. 32). The base pile operation cannot be shut down as long as customers arrive (Tr. 33).

Mr. Delgado complaints about safety did not relate to this termination. The company, in fact, rewarded Delgado for some of his safety awareness (Tr. 34).

Mr. Spradling considered Delgado to be a good employee (Tr. 34). Dixon, who is no longer with the Barrett Company, was the top management representative at the site (Tr. 34, 35). Dixon left the company four to five weeks ago but the witness didn't know the reason (Tr. 35).

Evaluation of the Evidence

This alleged discrimination arose after complainant Delgado left the jobsite and joined his wife for lunch on the company parking lot. Complainant indicated this was the normal lunch time but he agreed the workers do not "punch out" for lunch (Tr. 12, 26).

While he was at lunch the plant supervisor directed him to return to work. He stated he didn't want to eat dust. When he did return he was terminated.

The facts do not establish that Mr. Delgado was engaged in a protected activity. He refused to return to work because his lunch period was interrupted. The refusal was not based on any unsafe or unhealthy condition. Rather, he told Dixon that as soon as he finished eating he would go back to work right quick (Tr. 14).

Collateral issues arise as to whether complainant was fired because he complained about safety. No evidence supports the view that the company was retalilating against complainant. In fact, the testimony of respondent's witness Spradling is unrebutted that Delgado complaints about safety did not relate to his termination. In addition, the company had previously rewarded Delgado for his safety awareness (Tr. 34).

For the foregoing reasons I conclude that the complaint of discrimination filed herein should be dismissed.

Conclusions of Law

Based on the entire record, the following conclusions of law are entered:

1. The Commission has jurisdiction to decide this case.

2. Complainant failed to establish that he was discriminated against in violation of Section 105(c)(1) of the Act.

ORDER

Based on the foregoing facts and conclusions of law I enter the following order:

The complaint of discrimination filed herein is dismissed.

John J. Morris
Administrative Law Judge

Distribution:

Mr. Johnnie J. Delgado, 5423 Brookhill, San Antonio, TX 78228 (Certified Mail)

Barrett Industries, Inc., Mr. Franklin Spradling, Director of Safety, Rt. 3, Box 211B1, 6889 Evans Road, San Antonio, TX 78218 (Certified Mail)

/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER COLORADO 80204

DEC 16 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. WEST 81-186-M A.C. No. 05-03140-05005
v.	:	Cathedral Bluffs Shale Oil
CATHEDRAL BLUFFS SHALE OIL COMPANY, Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Morris

This case, a proceeding under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, was remanded by the Commission on November 5, 1986.

Prior to a resubmission of the issues the parties filed a motion seeking approval of a proposed settlement.

Citation 327786 herein alleged a violation of 30 C.F.R. 57.19-100. An original assessment of $90 was proposed.

The parties now seek a decision affirming the citation and assessing a penalty of $50.

I have reviewed the proposed settlement and I find it is reasonable and in the public interest. It should be approved.

Accordingly, I enter the following:

ORDER

1. The settlement is approved.

2. Citation 327786 is affirmed and a penalty of $50 is assessed.

3. Respondent is ordered to pay to the Secretary the sum of $50 within 30 days of the date of this decision.

John J. Morris
Administrative Law Judge

Distribution:

Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department of Labor, 4015 Wilson Boulevard, Arlington, Virginia 22203 (Certified Mail)

James M. Day, Esq., Cotton, Day & Doyle, 1899 L Street, N.W., 12th Floor, Washington, D.C. 20036 (Certified Mail)

/ot

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

DEC 16 1986

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
v.	:	Docket No. WEVA 86-250-R
	:	Order No. 2711286; 3/19/86
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Blacksville No. 1 Mine

DECISION

Appearances: W. Henry Lawrence, Esq., Steptoe and Johnson, Clarksburg, West Virginia, for the Contestant; William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Respondent.

Before: Judge Koutras

Statement of the Proceeding

This case concerns a Notice of Contest filed by the contestant against the respondent pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d), challenging the legality of a section 104(d)(2) order issued to the contestant at its Blacksville No. 1 Mine on March 19, 1986. The case was heard in Morgantown, West Virginia, and while the contestant filed posthearing arguments, MSHA did not. However, I have considered its oral argument's made during the course of the hearing.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301, et seq.

2. Sections 104(a) and (d), and 105(d) of the Act.

3. Commission Rules, 29 C.F.R. § 2700.1, et seq.

Issues

The issues presented in this case are: (1) whether the conditions or practices cited by the inspector in his order constitute a violation of 30 C.F.R. § 77.205, and (2) whether the violation was "significant and substantial." Additional issues raised by the parties are disposed of in the course of this decision.

Unwarrantable Failure Issue

At the conclusion of all of the testimony and evidence in this case, Inspector Magaiolo was recalled and asked whether he still believed the alleged violation resulted from contestant's unwarrantale failure to comply with the cited mandatory safety standard. Mr. Magaiolo stated that in light of the testimony presented by the contestant, particularly plant foreman Joe Fisher's testimony that he discovered the debris on the platform 2 hours before the issuance of the order and ordered it removed, he did not now believe that the violation was the result of an unwarrantable failure by the contestant to comply with the toeboard requirements of the cited standard. Mr. Magaiolo believed that the order should be modified to a section 104(a) citation, and MSHA's counsel agreed that this should be done. Counsel's motion in this regard was granted from the bench (Tr. 163-165).

Stipulation

1. The parties agreed that the contestant and the subject mine are subject to the Act and the jurisdiction of the Federal Mine Safety and Health Review Commission.

2. The parties agreed that assuming the contested order is affirmed, all of the pre-requisite statutory requirements for the existence of the "section 104(d) chain" have been met in this proceeding.

3. MSHA's counsel moved to modify the inspector's negligence finding from "high" to "moderate," and the motion was granted from the bench without objection.

Discussion

Section 104(d)(2) "S&S" Order No. 2711286, issued on March 19, 1986, cites an alleged violation of 77.205(e), and the condition or practice is described as follows:

> On the surface of the prep plant area in the headhouse, on the No. 2 reclaim belt floor,

there was approx. 13' of platform that requires toeboards. From this platform enormous amount of debris is accumulated and can be knocked to the below floor work areas. Citation 2711286 on 3/19 identified an entanglement of debris found this inspection. Toeboard was located on one side of the platform where a shovel and sledge hammer was laying partially over the edge. Due to the enormous amount of debris accumulated on this platform, it should have been obvious to management that a toeboard was needed.

MSHA's Testimony and Evidence

MSHA Inspector Joseph A. Migaiolo testified as to his background and experience, and he confirmed that he issued the contested order in question on March 19, 1986, and served it on mine management representative Patrick Wise who accompanied him during his inspection.

Mr. Migaiolo stated that he issued the order after finding that an elevated metal platform in the headhouse on the No. 2 reclaim belt floor did not have toeboards installed around its perimeter to prevent debris which was stored on the platform from falling off the end of the platform to the floor and ground below. He identified exhibit G-9, as a sketch of the platform which he made at the time he issued the order, and the debris which he observed is identified on the sketch. The debris consisted of conveyor belt strips, roof bolts, an 8 foot board, a metal platform plate weighing approximately 15 pounds, two pieces of metal plates weighing approximately 6 to 10 pounds, a 6 foot metal plate bent on one end, a bucket, a sledge hammer, and a shovel. The hammer and shovel were leaning against a toeboard which was installed along one side of the platform and they were protruding over the platform. The remaining items were located along the left and upper right side of the platform as shown in the sketch.

Mr. Migaiolo stated that a large drive motor was located on the platform, and the motor was used to drive the reclaim belt which passed under and by the end of the platform. The platform was approximately 10 to 12 feet above the belt floor, and access to the platform was by means of a walkway passing under it and up a stairway at the end of the platform.

Mr. Migaiolo stated that he asked Mr. Wise about the materials on the platform, and Mr. Wise advised him that the

materials apparently became lodged in the reclaim belt and were taken off the belt and placed on the platform. Mr. Migaiolo marked his sketch, exhibit G-9, with green markings indicating the platform areas which lacked a toeboard. One area was 3 feet long and the other area was 9 feet long.

Mr. Migaiolo stated that the existing toeboards were from 4 to 8 inches in height and were welded to the side of the platform. In order to determine whether toeboards are required, one must first determine whether anyone would be passing or working under the platform. In his opinion, persons such as a cleanup man, an examiner, or a repairman would normally travel or work under or on the platform and would also go up the stairs to reach the platform. The platform was subject to vibration from the motor while the belt was running, as well as from the normal vibration of the headhouse, and he believed that it was reasonably likely that the vibration would cause the debris to fall off the platform to the floor below. If these materials struck someone, they would inflict serious injuries.

Mr. Migaiolo stated that he observed an unprotected 4 to 5 inch gap or opening between the edge of the platform and the belt below for a distance of 3 feet. Platform vibration could result in a roof bolt rolling over the edge of the platform where there was no toeboard, through the opening and to the ground some 40 feet below. The roof bolt could hit the windshield of an end loader which normally worked on the ground under the opening.

Mr. Migaiolo observed that the platform had been recently hosed down with water but the debris and materials had not been removed. He observed no coal dust accumulations on the platform. He described the area under the platform as a "vacant work area," and he did not believe that it was a "high traffic area." However, he still believed that the materials and debris on the platform could fall off the unprotected edges and strike someone in the work areas below. He also believed that anyone passing under the platform would not always use the travelway along the wall, and that they would have access to the stairway by passing under the platform from different directions.

Mr. Migaiolo described the mine operator as conscientious in the manner in which it examined the building, and indicated that the headhouse is inspected and cleaned up at least once a day. He confirmed that the platform had a 32 to 34 inch "double barrel" handrail installed around its perimeter. Although someone on the platform inspecting the motor would

only be there for a few minutes, he believed that someone cleaning up coal in the work areas on the floor below would be there for 20 to 30 minutes and would be exposed to the hazard of the debris or material falling off because of the vibration or by someone inadvertently dropping something off the platform.

Mr. Migaiolo confirmed that he is the resident mine inspector and had previously inspected the mine. However, he could not recall previously inspecting the headhouse or platform. He stated that Mr. Wise advised him that the platform was used as a storage area for the debris from the belt, and he therefore concluded that the mine operator was aware of this. He also believed that the material and debris was collected over some period of time. Abatement was achieved within 3 hours after the order was issued, and toeboards were installed on the remaining portions of the platform (Tr. 5-40).

On cross-examination, Mr. Migaiolo stated that he looked over the edge of the platform through the opening between the platform and the belt below. He could see the ground through the opening but did not see an endloader. He believed that the endloader operated on the ground "swamp area" at least once a week cleaning up debris. He confirmed that he did not observe any of the material or debris on the platform moving or vibrating, and he did not ask anyone about how long the materials were there.

Mr. Migaiolo confirmed that he also issued a section 104(a) citation on March 19, 1986, because of the same debris and material on the platform. He believed the debris constituted a tripping and stumbling hazard to anyone on the platform, and he cited a violation of mandatory safety standard section 77.205(b), and made a finding of "moderate" negligence. When asked to explain and distinguish the difference between his section 104(a) citation and his section 104(d)(2) order, particularly since he found "moderate" negligence for both violations, he could not respond.

Mr. Migaiolo stated that since the plant had been in existence for a number of years, toeboards should have been installed on the platform. When asked to explain his prior testimony that toeboards are required only if persons working on the floor below are exposed to a hazard of being struck from falling objects, he reiterated that he believed that someone would be in the area at least once a day. He also explained that the platform was not previously cited because

he probably did not observe any material or debris on the platform (Tr. 40-81).

Contestant's Testimony and Evidence

Joe Fisher, plant foreman, stated that he is the afternoon shift supervisor, and that he has supervisory authority over the reclaim belt headhouse. He stated that the platform in question holds a motor and speed reducer for the No. 2 reclaim belt. He identified exhibit C-4 as a sketch of the platform area in question, and he confirmed that a second short belt 36 inches wide, with 8 inches of extensions on either side passed directly under the platform in question. He stated that the area under the platform opposite the steps and the short belt was a rather cramped area where very little work was performed. He stated that belt idlers were changed in the area every 2 years, and that work on the ground "swamp area" under the headhouse was performed every 2 weeks by a payloader.

Mr. Fisher stated that normal access to the platform was along a travelway leading to the stairs next to the wall. He also stated that a second means of access was by a stairway located near the 36 inch toeboard depicted in exhibit C-4, and the platform was protected by a toeboard at that location. A 3 inch high toeboard was installed along the perimeter of the platform on either side of the motor and along the side extending to the stairs in order to abate the violation.

Mr. Fisher stated that maintenance on the belt motor is performed on the platform, and that debris which is caught in the short belt is removed after the belt is stopped and locked out. Since the short belt passes 15 inches under the platform close to the top, any debris or material removed from the belt is simply placed on the platform until it can be removed from the area with an endloader. He confirmed that a cleanup man and the shift foreman (himself) would have occasion to be on the platform at any given time and that the cleanup man would stand on the stairs to hose the area down.

Mr. Fisher stated that the platform is not used as a regular storage area, but is used only for the purpose of placing debris from the short belt there until it can be removed by an endloader. It is placed on the platform from the short belt because it is easy and convenient, and he does not want to throw the debris off the belt onto the floor below.

Mr. Fisher confirmed that shortly before Inspector Migaiolo's inspection he went to the platform and observed some metal skirtboard material, strips of rubber, some roof bolts and a shovel on the platform. He instructed the cleanup man to hose down the platform with water and to remove the debris. He also confirmed that as the shift foreman, he is on the platform everyday.

Mr. Fisher stated that he did not believe additional toeboards were necessary on the platform because any debris falling off the platform along the edge where a new 30 and 48 inch long toeboard was installed for abatement would fall to the floor or the short belt below. It was his understanding that toeboards were only necessary where there was a possibility of something being kicked off the platform and striking someone below (Tr. 81-103).

On cross-examination, Mr. Fisher stated that the distance from the edge of the short belt to the stairs is approximately 16 inches, and that when he is on the platform to check the motor he is there for approximately 3 minutes. He confirmed that he was on the platform approximately 2 hours before the inspector arrived on the scene and observed the materials which he previously described. He did not observe the large board, but conceded that it could have been there. He picked up a roof bolt and placed it next to the existing toeboard.

Mr. Fisher confirmed that the platform vibrates, and he stated that the shovel is there to clean any coal that may be accumulated under the belt and the platform. He assumed that the sledge hammer was there to knock out any rock which may be lodged on the short belt chute. This work would be performed by someone standing on the short belt while it is stopped and locked out.

Mr. Fisher confirmed that he placed the materials on the platform shortly before the inspector's arrival and instructed the cleanup man to remove them and to hose down the platform. He also explained that if he is alone he cannot remove any debris taken from the belt by himself and must wait for the cleanup man who normally removes them with a payloader. He explained further that as a supervisor, he cannot perform any labor, and must rely on a union cleanup man to carry away any debris (Tr. 103-118).

Patrick Wise, dust foreman, stated that he sometimes serves as an escort for Federal inspectors, and he confirmed that he accompanied Inspector Migaiolo during his inspection of March 19, 1986. Mr. Wise stated that he observed a twisted

roof bolt, a bucket, a shovel, a piece of steel, and a board on the platform in question. He also stated that a 6 inch high toeboard was in place near the stairs leading to the platform, and he circled the area on exhibit C-4. He stated that a 3 inch high toeboard was welded over the 6 inch toeboard which was in place to abate the violation.

Mr. Wise stated that Inspector Migaiolo asked him how long the debris had been on the platform, and that he informed the inspector that he did not know and that he was not responsible for the headhouse and did not usually go there to perform his dust foreman's duties. Mr. Wise denied that he told the inspector that the platform was used as a storage area. Mr. Wise agreed with Mr. Fisher's testimony concerning the short belt which ran under the platform (Tr. 121-130).

Robert W. Gross, Safety Supervisor, Blacksville No. 1 Mine, stated that his duties take him to the headhouse at least once a week while conducting his fire inspections. He stated that prior to the issuance of the order in question, he was not aware of the existence of the platform because it was isolated and hidden behind the reclaim belt. However, since the order was issued he inspects the platform regularly to insure that no debris has accumulated there. He confirmed that when he observed the platform prior to the abatement, a toeboard was in place adjacent to the top of the stairway.

Mr. Gross stated that he did not believe that the platform was a crossover, elevated walkway, elevated ramp, or stairway requiring toeboards. He confirmed that he discussed the matter concerning a roof bolt falling between the opening between the platform and the belt to the ground below where an endloader sometimes is working and that he informed the inspector that the machine had a canopy. The inspector took the position that the roof bolt could strike the windshield, but Mr. Gross believed that this was not likely since the windshield is straight rather than curved.

Mr. Gross stated that when he observed the platform the day after abatement, he noticed the difference in the height of the toeboard which was installed next to the steps to achieve abatement and the old one which was previously there.

Mr. Gross believed that it was unlikely that something could fall off the platform and injure someone because the area was not frequently travelled. He stated that the inspector was more interested in material falling from the corner of the platform to the ground where there was a space between the platform and the reclaim belt (Tr. 135-147).

On cross-examination, Mr. Gross confirmed that while he could make decisions concerning the necessity for toeboards to be installed on the platform in question, he never considered this since he was unaware of the existence of the platform prior to the issuance of the violation. He confirmed that since the issuance of the violation in this case, more toeboards have been installed in elevated areas used to service equipment.

Mr. Gross confirmed that toeboards on the platform where there was prior access to the platform from another corner were installed when the plant was constructed prior to 1969 and he agreed that one could infer from this that the operator knew that an area around a stairway used for access to the platform presented a possible danger of material falling off the platform to the area below (Tr. 155). He also confirmed that no toeboards were installed along the cited perimeter of the platform above the short belt which passed under the platform. He stated that he did not know how the belt was constructed, and although a belt "extension" would lessen the likelihood of falling objects from the platform striking the belt and bouncing off, he conceded that such an occurrence was possible (Tr. 158).

Inspector Migaiolo was recalled by the Court, and he stated that he had no particular recollection of the existence of the short belt under the platform in question, but had no reason not to believe the testimony of the contestant's witnesses with respect to the existence of this belt. He also stated that he did not observe the 14-inch long toeboard installed by the stairway leading to the platform, and he confirmed that his principal concern was the fact that the missing toeboard along the perimeter of the platform as depicted at the upper left-hand corner of his sketch (exhibit G-9), presented a hazard of material such as a roof bolt falling between the opening to the ground below and striking the windshield of the front-end loader operating in the "swamp area" below (Tr. 160-164).

Contestant's Arguments

During the course of the hearing, contestant's counsel argued that subsection (e) of section 77.205, does not include platforms of the kind cited by the inspector in this case, and that it is inapplicable to the facts of this case. He pointed out that section 77.205 deals with "Travelways," and suggested that if the inspector were concerned that the platform were being used as a storage area, he should have cited section

77.208(a), which requires the storage of materials "in a manner which minimizes stumbling or fall-of-material hazards." Counsel pointed out that if the materials in question should not have been on the platform, or if they simply presented a tripping hazard, there would be no need for toeboards. Counsel further pointed out that the contestant has installed toeboards in the plant as necessary, particularly over walkways where people are likely to be travelling or working, and that this is done to afford protection from falling objects. Counsel concluded that the only piece of equipment which would be operating below the platform was an end loader in the "swamp area" on the ground level under one corner of the platform, and that it was equipped with a roof and vertical windshield. He asserted that a roof bolt falling from the platform would hit the roof of the endloader, and that it was highly unlikely or foreseeable that it would strike the windshield and injure the operator. He also argued that the contestant's evidence established that no one travels or works under the platform, and that even if required by subsection (e), the contestant believed that toeboards are not necessary because no one is exposed to a falling object hazard (Tr. 167-168).

In his posthearing proposed findings and conclusions, contestant's counsel argues that the cited platform in question is not an elevated walkway in that it did not serve as an area over which workers travelled from one work area to another, and that subsection (e) of section 77.205 simply does not apply in this case. Except for an endloader with a steel roof and vertical windshield which operated in a "swamp area" on the ground below the platform approximately twice each month, counsel cites the absence of any evidence that any other individuals would be exposed to falling objects either inside or outside the slope headhouse containing the platform. With respect to the endloader, counsel asserts that it was highly unlikely that materials from the platform could fall through the 4 to 5-inch wide gap at one end of the platform to the "swamp area" some 40 feet below, and even if it did, it was highy unlikely, if not impossible, that falling debris would strike the operator because he is protected by a steel roof and the windshield is vertical. Assuming the applicability of subsection (e), counsel concludes that in these circumstances, a toeboard at the corner location of the platform where the gap existed was not necessary.

Counsel further argues that the inspector issued the citation on the mistaken and erroneous belief that the platform was used as a storage area and that employees worked or travelled under the edges of the platform where toeboards were not present. Counsel concludes that MSHA has presented

no credible evidence to support these assumptions, and he points out that the evidence establishes that the debris taken from the belt and placed on the platform had existed there for approximately 2 hours, and that foreman Fisher had instructed an employee to remove the debris from the platform.

MSHA's Arguments

During oral argument, MSHA's counsel took the position that since subsection (e) is the only provision specifically referring to toeboards, the term "elevated walkways" as used in the standard encompasses work areas on elevated platforms on which individuals would be required to walk from one point to another, and that the requirement for toeboards where necessary is designed to prevent the type of hazards that would occur on platforms (Tr. 78).

MSHA's counsel also took the position that the question concerning the need for toeboards on the cited platform would depend on whether debris is placed there as a matter of practice, or whether it is a one-time occurrence (Tr. 150). He agreed that the installation of toeboards along some perimeter areas of the platform, and not along other locations, appeared to be based on judgments by mine management that some areas needed protection from falling objects, while others did not (Tr. 156). Counsel also concluded that the cited platform falls within section 77.205, and that the inspector's concern about objects falling off the edge to the ground floor below has been substantiated by the evidence and that the citation should be affirmed (Tr. 166).

Findings and Conclusions

The contestant in this case is charged with a violation of mandatory safety standard 30 C.F.R. § 77.205(e), for failing to install toeboards along a 13-foot perimeter of an elevated metal platform located in the preparation plant headhouse. The platform contained a large motor used to drive a belt which passed under the platform, and access to the platform for purposes of servicing the motor is by a stairway at one end. The inspector issued the citation after finding that debris which had been taken from the belt and placed on the platform had not been removed or cleaned up. The inspector believed that the additional toeboards were required to prevent the debris from falling off the platform and striking people who he believed would be working or travelling or working under the platform.

The inspector confirmed that he issued a second citation (exhibit C-3), at the same time, citing the same debris. The second citation was issued pursuant to subsection (b) of section 77.205, because the inspector believed it constituted a tripping or stumbling hazard to persons on the platform. That citation is not in issue in this case.

Section 77.205(e) provides as follows: "Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary toeboards shall be provided."

The critical question in this case is whether or not the cited platform area comes within the scope of section 77.205(e), and whether or not it may be considered a "crossover, elevated walkway, elevated ramp, or stairway" requiring toeboards "as necessary." Toeboards were in place at some locations on the platform, but not in others. The inspector was concerned that the debris found on the platform could fall off and strike someone walking or working under the platform.

There is no evidence in this case that the platform in question is a crossover, elevated ramp, or stairway. Even though the inspector described the area where the debris was found as a platform, and the standard makes no references to platforms, MSHA takes the position that the platform may be considered an elevated walkway for purposes of section 77.205(e). The contestant takes the position that the platform is not a walkway within the meaning of the cited standard. Even if it were, contestant takes the further position that toeboards would then only be required if it were necessary. On the facts of this case, contestant concludes that toeboards at the cited platform locations were not necessary.

In Sunbeam Coal Corporation, Docket No. PITT 79-213, 2 FMSHRC 192, 221 (January 29, 1980), I vacated a violation issued by an inspector who alleged that an elevated platform area used for maintenance purposes was a walkway within the meaning of section 77.205(a), and that safe access to the asserted walkway was not provided and maintained. In that case, MSHA attempted to amend its pleadings to cite a violation of subsection (e) of section 77.205, claiming that the platform area was a walkway within the meaning of that subsection. I ruled that the cited platform was in fact a platform work station used for maintenance purposes and not a walkway normally used by miners to travel in and through the plant, and the inspector candidly admitted that this was the case.

In Climax Molybdenum Company, 2 FMSHRC 1884, 1887, July 25, 1980, Commission Judge Morris vacated a citation issued for an alleged violation of section 57.11-2, a standard applicable to metal and nonmetal underground mines and identical in language to section 77.205(e). The operator was charged with a violation for failure to provide handrails on the top of the roof of a 10-foot high shed located inside a larger building. The inspector found empty cardboard boxes a foot from the edge of the roof of the shed and he believed the roof was used as a "storage area." Judge Morris vacated the citation on the ground that the top of the shed was not one of the areas described in the standard and was not a crossover, an elevated walkway, an elevated ramp, nor a stairway, as stated in the standard.

In Magma Copper Company, 1 FMSHRC 837, 857-858, July 3, 1979, I vacated a citation for an alleged violation of section 57.11-2, after finding that a work platform 100 feet above ground was not a "travelway" as defined by section 57.2. Section 57.2 defines a "travelway" as "a passage, walk or way used and designated for persons going from one place to another."

I take note of the fact that the inspector cited the same debris on the platform in support of a second citation issued at the same time the citation in issue here was issued. The second citation cited a violation of section 77.205(b) because the inspector believed that the debris also constituted a tripping or stumbling hazard to anyone on the platform. MSHA's attempts in this case to transform a platform into a walkway simply to support a violation of section 77.205(e) IS REJECTED.

On the facts of this case, I cannot conclude that MSHA has established that the platform in question was in fact a walkway as I understand the meaning of that term. While it is true that one person would have occasion to be on the platform in the normal course of any given day and would have to walk along the platform to reach the belt motor, the platform was not used as a regular and routine route of travel for miners travelling or working in the headhouse. It seems obvious to me that the inspector cited subsection (e) because it contains the only reference to toeboards, but does not include platforms among the locations encompassed by that standard. Subsection (b) refers to travelways and platforms and requires that they be maintained clear of extraneous material and other stumbling or slipping hazards. The inspector

did not cite subsection (b) because it contains no requirements for toeboards.

It seems to me that after much litigation with respect to this standard, MSHA could easily cure the ambiguity by amending its standards to specifically include the term "platform" as part of subsection (e) and include a reference to toeboards as part of subsection (b). I conclude and find that the platform in question does not fall within the intent and meaning of subsection (e) of section 77.205, and the citation IS VACATED.

Assuming that I were to find that the platform area in question was an "elevated walkway" I would still vacate the citation on the ground that MSHA has failed to present any credible testimony or evidence that toeboards were necessary at the locations cited by the inspector. The regulatory language "where necessary" as found in section 77.205(e) obviously means that toeboards are not to be provided in every instance. Big Ten Corporation, 2 FMSHRC 2266, 2280 (August 15, 1980). In that case, former Commission Judge Stewart vacated a citation alleging a violation of section 77.205(e) on the ground that the walkway was sufficiently safe without toeboards since it was used approximately 1,500 times over a 5-year period and had never been previously cited for lack of toeboards. He concluded that the absence of any prior citations was indicative of the fact that the lack of toeboards did not constitute a violation of the standard.

The evidence in this case establishes that the platform in question is a "mezzanine area" located between the third and fourth floor of the headhouse, and that it is used to house a motor which drives a belt passing under the platform. Access to the platform is by means of a flight of steps located at one corner, and employees would have to pass under the platform to reach the stairway. The evidence also establishes that the normal route to the stairway is along a designated travelway beside a wall along and under one side of the elevated platform (Tr. 14-15). The inspector described the walkway area under the platform as a "vacant work area" and not a "high traffic area." However, he apparently believed that workers passing through this area to reach the stairway would be exposed to falling debris from the platform (Tr. 36). Although the inspector also believed that workers would pass under the platform at other locations, the contestant's credible testimony established that a belt was located under the platform and that it would block access to anyone passing under the platform. While the inspector could not recall the

belt, he had no reason to dispute the testimony by the contestant in this regard, and I conclude that the belt did in fact pass under the platform and would serve as an impediment to anyone attempting to reach the stairway by walking under the platform.

MSHA has produced no credible testimony or evidence that anyone was exposed to any falling debris hazard in this case. I find the inspector's belief that a roof bolt could fall off the platform down between the small opening at the edge of platform and strike an endloader operating at ground level 40 feet below and cause injury to the equipment operator to be highly speculative. The contestant's credible testimony established that the endloader was protected by an overhead canopy and that the windshield is vertical. Further, the inspector conceded that the area under the platform is not a high traffic area and that any hazard would be limited to one person. Although he indicated that a repairman, cleanup man, or maintenance and examination personnel would be exposed to a falling debris hazard, these conclusions on his part are unsupported by any specific evidence establishing that this was in fact the case. The inspector did not contact or speak with any of these individuals, nor did he support his conclusions with facts.

Foreman Fisher confirmed that a toeboard was in place in the stairway area under the belt and platform to protect people using the stairway. With regard to the areas cited by the inspector, he confirmed that no toeboards were ever installed in those locations and that no inspectors had ever mentioned the need for toeboards in those areas during any prior inspections (Tr. 101). Mr. Fisher also stated that he can observe the platform area visually, and the only time he goes there is to check the belt motor oil and that this usually takes about 3 minutes (Tr. 109). Belt cleanup is performed under the platform, and the belt is greased twice a year (Tr. 113).

Dust foreman Wise stated that he spends little time in the platform area in question, but that the platform is "out of the way" and that prior to the citation he did not even know of its existence (Tr. 130). In his opinion, the likelihood of something falling off the platform and injuring someone was "one in a million" (Tr. 134).

Safety supervisor Gross testified that he normally walks through the headhouse once a week on Fridays, and that prior to the citation he was not even aware of the existence of the platform because "it's hidden behind the belt." His normal

route of travel while checking fire hoses and accumulations of combustible materials would take him under the belt and down the stairway along the back wall. However, since the issuance of the citation, he checks the platform for materials (Tr. 137-138). He did not consider the platform area as a "work area" and that people are not normally there (Tr. 138-139).

ORDER

In view of the foregoing findings and conclusions, the contest filed in this proceeding IS GRANTED, and the modified section 104(a) Citation No. 2711286, issued on March 19, 1986, charging a violation of 30 C.F.R. § 77.205(e), IS VACATED.

George A. Koutras
Administrative Law Judge

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DEC 17 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-371
	:	A.C. No. 46-03084-03510
v.	:	
	:	Winifrede Central Shop
U.S. STEEL MINING COMPANY, INC., Respondent	:	

DECISION

Before: Judge Melick

This case is before me upon the petition for civil penalty filed the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et. seq., the "Act", for a violation of the regulatory standard at 30 C.F.R. § 77.1713(a). The general issues before me are whether U.S. Steel Mining Company, Inc., (U.S. Steel) violated the cited standard and, if so, whether that violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety or health hazard i.e., whether the violation was "significant and substantial". If a violation is found it will also be necessary to determine the appropriate civil penalty to be assessed in accordance with Section 110(i) of the Act.

The citation at bar, No. 2717754, alleges a "significant and substantial" violation at the Winifrede Central Shop and charges as follows:

> Examinations of the working areas were not being conducted for hazardous conditions in the working areas of the truck shop on B and C shifts and in the electrical shop on C shift.

The cited standard, 30 C.F.R. § 77.1713(a), captioned in part as "daily inspection of surface coal mine", requires that "at least once during each working shift, or more often if necessary for safety, each active working area and each active surface installation shall be examined by a certified person designated by the operator to conduct such examinations for hazardous conditions and any hazardous conditions noted during such examinations shall be reported to the operator and shall be corrected by the operator."

The parties in this case agreed to waive hearing and to submit the matter on a joint stipulation of facts. The stipulation as amended reads as follows:

1. The respondent operates the Winifrede Central Shop (hereinafter "the Shop") which is the subject of this proceeding.

2. The shop is located in Winifrede, West Virginia. The shop is located approximately 8.5 miles from the Number 50 Surface Mine which is an operating coal strip mine. It is located approximately 5 miles from the Morton Mine which is an operating undergound coal mine. The shop is located approximately one-half mile from the Winifred Central Cleaning Plant, a coal preparation plant.

3. The shop's function is to repair and maintain electrical and mechanical equipment from the No. 50 Surface Mine, the Morton Underground Mine and the Winifrede Central Cleaning Plant. The preparation plant processes coal mine from both surface and underground mines.

4. The shop has separate supervision from any of the aforementioned mines or plants, and has a separate MSHA mine identification number.

5. The shop is composed of a one-story electrical shop building of approximately 3200 square feet, and a one-story automotive repair building of 4300 square feet. When the shop is in operation, some fourteen employees would have been working in the electrical shop and two employees in the automotive repair shop.

6. On March 3, 1986 Inspector Ronald Brown issued Citation No. 2717754. The inspector observed that no inspection, as required by 30 CFR § 77.1713 was made in the working areas of the automotive repair building on the B or C shifts and no such inspection had been made in the electrical shop on the C shift on that date. The operator does not dispute this observation.

7. The employees at the shop are subject to hazards inherent in workings in areas where heavy equipment is being moved, electrical work, grinding, cutting, sharpening and welding are being done and

where lathes and drill presses are operating. The work area also contains flammable and caustic liquids.

8. A copy of the above-mentioned citation was properly served upon, and received by, the mine operator.

9. . . . Exhibit A is an accurate statement of the number and type of violations occuring at the shop from March 3, 1984 to March 3, 1986.

10. The alleged violation was timely abated after the operator began to conduct inspections for hazardous conditions in all working areas on each work shift.

11. Payment of the proposed penalty of $168.00 would not affect the operator's ability to continue in business.

12. MSHA Policy Memorandum No. 85-4(c), dated April 8, 1985, accurately reflects current MSHA enforcement policy regarding 30 CFR § 77.1713.

U.S. Steel argues in this case that the shop at issue herein is not subject to the cited regulation because it is not a surface coal mine. The cited regulation by its caption applies to "surface coal mine[s]". More specifically the standard on its face applies to "each working area and each active surface installation [of such surface coal mines]". By stipulation the shop herein is used to repair and maintain electrical and mechanical equipment from, among other places, the nearby (only 8.5 miles) No. 50 Surface Coal Mine. Within this framework it may reasonably be inferred that the Winifrede Central Shop was an "active surface installation" of the No. 50 Surface Coal Mine. The fact that the shop is also used to repair equipment from the nearby (5 miles away) Morton Underground Coal Mine is not, in my opinion germane to the issue of liability in this case.

The parties in their joint stipulations of fact and in their briefs have also made referance to an MSHA policy memorandum on the subject of the cited standard (MSHA policy memorandum No. 85-4(c)). That memorandum only serves to confirm the stated positions of both parties that the cited standard is indeed applicable to surface coal mines. Under all the circumstances it clear that the violation has been proven as charged.

Based on the limited stipulations furnished in this case however I cannot determine whether the violation was "significant and substantial", see Secretary v. Mathies Coal Co., 6 FMSHRC 1 (1984), nor whether it was of high gravity. For the

same reasons I am able to find but little negligence. It appears that the Respondent has been operating under a mistaken but good faith belief that the shop was not subject to the inspection requirements of the cited standard.

Considering the additional stipulations of factors to be considered under section 110(i) of the Act, I find that a penalty of $50 is appropriate.

ORDER

U.S. Steel Mining, Co., Inc. is hereby directed to pay civil penalty of $50 within 30 days of the date of this decision.

Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 18 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 86-126 A. C. No. 01-00515-03648
v.	:	Mary Lee No. 1 Mine
DRUMMOND COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Merlin

The parties have filed a joint motion to approve settlements of the two violations involved in this case. The settlements are the result of a conference call between the Solicitor, operator's attorney, and the Judge. The total of the originally assessed penalties was $1,450. The total of the proposed settlements is $1,250.

The motion discusses both violations in light of the six criteria set forth in section 110(i) of the Federal Mine Safety and Health Act of 1977. Order No. 2602747 was issued for violation of 30 C.F.R. § 75.200 because of noncompliance with the approved roof control plan. An insufficient number of timbers had been installed in an area where there had been a roof fall. The timbers were spaced too far apart. In addition, the area of the roof fall had been cut too wide and there was evidence that a miner had walked eight feet under unsupported roof. The operator has agreed to pay the $800 penalty originally assessed for this violation.

Order No. 2602744 was issued for violation of 30 C.F.R. § 75.1003-2 because a piece of off-track equipment was transported along the trolley roadway without the proper precautions having been taken. A reduction in the proposed penalty for this violation from $650 to $450 is now recommended because of reduced negligence. The operator believed in good faith that the equipment involved, a conveyor tailpiece, was not covered by the regulation. The Solicitor further advises that the term "off-track" is not presently defined in the regulations and that accordingly, negligence is less than originally estimated.

The representations and recommendations of the parties are accepted.

Accordingly, the motion to approve settlements is GRANTED and the operator is ORDERED TO PAY $1,250 within 30 days of the date of this decision.

Paul Merlin
Chief Administrative Law Judge

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DEC 19 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF RONNIE DALE CLARK, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. KENT 86-10-D
	:	MSHA Case No. BARB CD 85-46
v.	:	
ELDRIDGE COAL COMPANY, CHARLES & JIM ELDRIDGE, Respondents	:	

DECISION

Appearances: William F. Taylor, Esq., U.S. Department of Labor, for the Complainant; Jim Eldridge and Charles Eldridge, pro se and representing Eldridge Coal Company, Inc.

Before: Judge Fauver

This is a discrimination proceeding brought by the Secretary of Labor under § 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq. The complaint alleges that Ronnie Dale Clark, an underground coal miner, was constructively discharged by Respondents because the working conditions at Eldridge Coal Company's Kelloke Mine, where Clark was employed, were so unsafe and intolerable that Clark was unable to continue working.

After a hearing, post-hearing depositions were allowed and filed as part of the record.

Having considered the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

1. Ronnie Dale Clark, during his employment with Eldridge Coal Company, especially during the last few weeks of his employment in 1985, made several safety complaints to his immediate supervisors, William Blevins and Jim Eldridge. Among other things, Clark complained about an imminent danger associated with the coal feeder he was assigned to operate.

2. For about two months immediately before Clark's employment termination (March 15, 1985, his last day of work), he was

instructed by Mine Foreman Jim Eldridge to block in the coal feeder's electrical contactor points with a capboard, thereby bypassing a breaker and the on/off switch. In order to engage or block in the contactor points, Clark was instructed by Jim Eldridge to place the on/off switch in the feeder starting box, at the operator station, in the off position, remove the electrical component lid, place his hands within the component box and reposition the capboard. Clark stated that this pratice was extremely hazardous, that it created an imminent danger, and that he was afraid the practice would kill him.

3. On several occasions Clark complained about this practice to both of his supervisors, William Blevins and Jim Eldridge. On many occasions he asked Bill Blevin or Jim Eldridge to have someone repair the feeder. His pleas fell on deaf ears and it became abundantly clear to Clark that no action was going to be taken to correct the imminent danger to which he was exposed daily.

4. Clark made one last attempt to have the feeder placed in a safe condition, when he visited the home of William Blevins on Sunday afternoon, March 17, 1985. Clark stated that he went to Blevins to discuss the unsafe conditions of the coal feeder and to determine whether or not the feeder had been repaired and placed in a safe operating condition. When Blevins informed Clark that no action had been taken to repair the feeder, Clark informed Blevins that he would not report to work on Monday morning, March 18, 1985, because of the unsafe and imminently dangerous working conditions at Eldridge Coal Company.

5. About a week after informing his immediate supervisor, William Blevins, that he was withdrawing from the imminently dangerous working conditions at Eldridge Coal Company, Clark went to Mine Foreman Jim Eldridge's home to find out whether or not the coal feeder had been repaired so that he could return to work. During this conversation Clark was told that he no longer held a job with Eldridge Coal Company.

DISCUSSION WITH FURTHER FINDINGS

The testimony of Clark is confirmed by his supervisor William Blevins and by an MSHA electrical expert.

Blevins stated that Clark, on at least two occasions, expressed to him that he was greatly concerned about the unsafe condition of the feeder. Blevins was also present when Clark made complaints to Mine Foreman Jim Eldridge concerning the dangerous condition of the coal feeder. Blevins was also present when Clark made complaints to Mine Foreman Jim Eldridge concerning the dangerous condition of the coal feeder. Blevins explained the situtation as follows:

> Jim [Eldridge] was present when Ronnie [Clark] asked us to fix [the coal feeder] and he said '. . . that we'd get it fixed on Saturday' I think it was one day through the week and he said 'they would work on it on Saturday, on a day . . .' you know . . . 'where they could shut it down.' [Evidentiary Deposition, page 4, Response to Question D20.]

Blevins also confirmed the dangers associated with blocking in the feeder contactor points. In particular, Blevins stated that the practice of opening the starting box to reposition the capboard caused one to be exposed to energized electrical components, and using the capboard to block the contractor points was an unsafe practice.

Federal Mine Safety and Health District Electrical Supervisor Henry Standifer, with many years of electrical experience in both the private coal industry and in government safety enforcement, testified that the practice of blocking in the contactor points as described by Clark created a very unsafe condition. Standifer explained the situation as follows:

> QUESTION BY TAYLOR: The situation that Mr. Clark described in turning off the breaker and placing his hands inside the starting box to put the capboards under the contactors to block them in, what type of hazard does that create?
>
> ANSWER BY STANDIFER: He exposes hisself [sic] to 480 volts anytime that you open the door and go inside that box.
>
> QUESTION: Would you consider that in your experience as an electrical supervisor in [sic] the number of years that you've had in the coal industry in private sector and government sectors, would you consider that situation an imminent danger?
>
> ANSWER: Absolutely. [Evidentiary Deposition at page 21, Questions 34 and 35.]

Standifer also provided statistical data showing the number of deaths and injury producing accidents associated with electrical hazards in the area of Harlan County, Kentucky where the Eldridge Coal Comany was located.

In Simpson v. Kenta Energy, Inc., 4 FMSHRC 1023 (1986), the Commission held that Simpson was not within the protection of § 105(c) because he did not notify the operator of the perceived dangerous conditions before his work refusal. The Commission also stated that in order to establish a constructive discharge the miner must show that in retaliation for protected activity the operator created or maintained intolerable working conditions in order to force the miner to quit.

The instant case clearly meets both tests of the Simpson case. Clark on several occasions complained about the dangers associated with blocking in the capboard. The complaints were directed to Clark's immediate supervisor/face boss William Blevins, and on at least one occasion to Mine Foreman Jim Eldridge, who is the individual responsible for creating the hazard in the first instance. Clark went to Blevins' home on the afternoon of Sunday, March 17, 1985, to complain about the hazard and to ascertain if his pleas had caused mine management to correct the dangerous working conditions. Clark met his obligation of communicating the perceived hazard to mine management before his work refusal.

Clark's situation also satisfies the second element of the Simpson test, which requires the miner to show that the operator was motivated to maintain the unsafe condition because of the miner's engagement in a protected activity.

In considering discharge motivations, the Commission has long recognized that direct proof of a discriminatory motive is not often possible. The adjudicator often must look to circumstantial evidence to draw inferences regarding the motivating factors. Chacon v. Phelps Dodge Corp., 2 FMSHRC 1505 (1981); Brazell v. Island Creek Coal Company, 2 FMSHRC 1801 (1982); Bradley v. Belva Coal Company, 2 FMSHRC 1729 (1982); Neal v. W.B. Coal Company, 2 FMSHRC 1225 (1981) (PDR denied, reversed on other grounds 704 F.2d 275 (6th Cir. 1983), vacated in part 719 F.2d 194 (6th Cir. 1983).

I find that the circumstances of this case show that the operator intended to force Clark to quit because of his protected activities, i.e., complaints about unsafe working conditions. In reaching this finding I have considered the following: (1) Clark for approximately two months prior to employment termination had lodged complaints about his exposure to an imminent electrical hazard, as well as other hazards at the mine; (2) Clark made the operator keenly aware of the hazard (in fact the hazard was specifically produced by mine management); (3) no action was taken by mine management to correct the hazard during Clark's employment; (4) Clark was given a "Hobson's choice" of working in an imminently dangerous environment or withdrawing from work; (5) Clark withdrew from his employment on March 17, 1985 by informing Blevins of his intent not to report to work on Monday, March 18, 1985; (6) immediately after Clark withdrew from the job the hazard was eliminated by management causing the feeder to be repaired; (7) Russell Kelly replaced Clark as feeder operator on March 19, 1985, the day after Clark informed management of his work refusal (Kelly stated he did not experience any problem with the feeder; the reason Kelly did not experience any problem with the feeder was explained by Blevins who stated that the feeder was repaired before Kelly was assigned to operate the feeder).

The circumstantial evidence in this case clearly indicates that the operator was motivated to maintain the hazardous condition in retaliation of Clark's protected activities.

The Act places safety responsibility on the shoulders of both the operator and the miner. It is the miner's obligation before a work refusal to inform the operator of the hazardous conditions. A corresponding responsibility applies to the operator as well. Once the operator is placed on notice that a hazard exists the operator is obligated to address the hazard. See Secretary of Labor v. Metric Constructors, Inc., 3 FMSHRC 1259 (1984); Secretary of Labor on behalf of Pratt v. River Hurricane Coal Co., Inc., 3 FMSHRC 1053 (1983); Secretary of Labor on behalf of Bush v. Union Carbide Corp., 2 FMSHRC 2152 (1983). If the operator chooses not to address the perceived hazard, it thereby gives the miner the right of withdrawing from the hazard and refusing to work until the condition is corrected or in some way satisfactorily addressed.

Clark was faced with an imminent danger created directly by the orders of his Mine Foreman, Jim Eldridge. MSHA Electrical Supervisor Henry Standifer stated that if he had observed the situation Clark described he would have issued an imminent danger order of withdrawal pursuant to § 107(a) of the Act. Standifer considered the situation described by Clark as extremely hazardous and likely to cause death or serious injury. Clark was being exposed to 480 volts of electricity each time he was required to place his hands in the coal feeder's starting box to reposition the capboard. The practice of blocking in the capboard clearly falls within the definition of an imminent danger as that term is used in § 107(a) of the Act. See Eastern Associated Coal Corporation v. IBMA, 491 F.2d 277 (4th Cir. 1974), 1 FMSHRC 1119.

Clark made the operator aware of the hazard and he asked each of his supervisors to take action to repair the feeder and thereby remove the hazard. The operator chose to ignore his complaints, leaving Clark with no alternative than withdrawing from the imminent danger. Clark exercised his right to withdraw on March 17, 1985. About one week later, Clark reported to Mine Foreman Jim Eldridge to determine whether the coal feeder was repaired and if so to return to work. Eldridge told him he was no longer employed by Eldridge Coal Company.

Under the circumstances Clark was justified in removing himself from the hazard and refusing to work. Robinette v. United Castle Coal Company, 2 FMSHRC 1213 (1981). The delay of one week before reporting back to work was reasonable considering that Clark had complained of the imminent danger for several weeks without any success in obtaining relief of the situation. Eldridge Coal Company's refusal to reinstate Clark constituted adverse action motivated by a protected work refusal. Such action by the operator violates the Act and affords Clark the

protection of § 105(c). See Pasula v. Consolidation Coal Company, 2 FMSHRC 1001 (1980) reversed on other grounds sub. nom. Consolidation Coal Company v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Dunmire and Estle v. Northern Coal Company, 2 FMSHRC 1585 (1982); Jenkins v. Hecla-Day Mines Corporation, 3 FMSHRC 1527 (1984); Robinette, supra.

Jim Eldridge was a supervisor and mine foreman at the time of Clark's constructive discharge on March 15, 1985. Charles Eldridge was Vice President of Eldridge Coal Company, Inc., and was a managing official on-site at the Kelloke Mine on a daily basis. Both were also in such managerial positions when Respondent refused to reinstate Clark about a week later.

Section 105(c)(1) of the Act provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner. . . . [Emphasis added.]

The language of § 105(c) makes it clear that both Jim Eldridge and Charles Eldridge, as individuals, are subject to the Act. Further, the legislative history unequivocally supports this position. The Senate Committee Report in regard to § 105(c) states:

> It should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved. [Legislative History of the Federal Mine Safety and Health Act of 1977, page 624; emphasis added.]

In Mine Workers, Local 9800 v. Dupree, 2 FMSHRC 1077, (1980), Local 9800 filed a complaint of discrimination alleging that MSHA and its agent Dupree had engaged in activities which violated § 105(c) of the Act. MSHA, in seeking a dismissal of the complaint, argued that it was not subject to liability under § 105(c). Judge Broderick disagreed. In holding that MSHA comes within the scope of § 105(c), the judge looked to the plain meaning of § 105(c) and also to the intent of Congress. He found that the Act prohibited discrimination from any source. The judge, relying on the legislative history, states at page 1078 of the Dupree case: "Section 105(c) is 'to be construed expansively' in order 'to assure that miners will not be inhibited in any way from exercising any rights afforded by the legislation'."

The judge went on to hold:

> Because the purpose of the statutory provision was to protect miners from discrimiation from any source, and following an expansive construction, MSHA is found to

be a person under Section 105(c) prohibited from discriminating against any miner. [Dupree, supra, 1078.]

I hold that Jim and Charles Eldridge come within the definition of a "person" and as such fall within the scope of § 105(c). Both Jim Eldridge and Charles Eldridge will be held personally responsible for the unlawful discharge of Clark. They and the corporation will be held jointly and severally liable for sanctions including back pay, interest, and a civil penalty.

The element of damages is the amount of pay lost between the date of constructive discharge, March 15, 1985, until the date the Kelloke Mine ceased operation (May 24, 1985), plus back interest until payment of damages.

In assessing a civil penalty, I note that Respondent was a small operator during the period involved, and that the subject mine is out of business.

Considering all the criteria for assessing a civil penalty under section 110(i) of the Act, I find that a penalty of $100 is appropriate for this violation.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in this proceeding.

2. Respondents violated section 105(c)(i) of the Act by constructively discharging Ronnie Dale Clark as alleged in the complaint.

ORDER

WHEREFORE IT IS ORDERED that:

1. Respondents are jointly and severally liable for, and shall pay over to the complaining miner, Ronnie Dale Clark, back wages in the amount of $3,600.00, plus $556.54 interest, computed from the date of discharge through December 22, 1986, for a total of $4,156.54. Said amount shall be immediately forwarded to Ronnie Dale Clark at Post Office Box 19, Holmes Mill, Kentucky 40843. If such payment is not made, interest after December 22, 1986, shall accrue at the rate of 9% per annum until full payment is made to Ronnie Dale Clark.

2. Respondents are jointly and severally liable for, and shall pay, a civil penalty of $100 for the violation found herein.

William Fauver
William Fauver
Administriative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 23 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), ON BEHALF OF DONALD R. HALE, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. VA 85-29-D
	:	NORT CD 83-8
v.	:	No. 4 Mine
4-A COAL COMPANY, INC., Respondent	:	

ORDER OF DISMISSAL

Before: Judge Melick

The Secretary of Labor with the consent of the individual Complainant, Donald Hale, requests approval to withdraw his complaint in the captioned case citing as grounds therefore, a mutually agreeable settlement. Under the circumstances herein, permission to withdraw is granted and the case dismissed. 29 C.F.R. § 2700.11. In accordance with the settlement agreement the Respondent, 4-A Coal Company, Inc., is directed to forward to counsel for the Secretary within 30 days of the date of this order, a certified or cashier's check in the amount of $700 payable to Donald R. Hale or the Mine Safety and Health Administration.

Gary Melick
Administrative Law Judge
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FALLS CHURCH, VIRGINIA 22041

DEC 23 1986

KANAWHA COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 86-96-R
v.	:	Order No. 2581293; 12/19/85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Madison No. 2 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-256
	:	A.C. No. 46-02844-03562
v.	:	Madison No. 2 Mine
KANAWHA COAL COMPANY, Respondent	:	

DECISION

Appearances: Edward N. Hall, Esq., Robinson & McElwee, Lexington, Kentucky, for Contestant/Respondent Kanawha Coal Company (Kanawha); Jonathan M. Kronheim, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia for Respondent/Petitioner Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Kanawha filed a Notice of Contest challenging the withdrawal order issued on December 19, 1985 under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary subsequently filed a Petition for the assessment of a civil penalty for the violation of a mandatory safety standard charged in the contested order. The two cases were consolidated for the purposes of hearing and decision. Following pretrial discovery, the consolidated cases were heard pursuant to notice in Charleston, West Virginia on September 11, 1986. Dennis Cooke and Edward White testified on behalf of the Secretary. Troy

Morris, David Sprouse, Robert Dotson, Ricky Spurlock, Virgil Martin, and Roy Purdue testified on behalf of Kanawha. Both parties have submitted post hearing briefs. Based on the entire record, and considering the contentions of the parties, I make the following decision.

ISSUE

The issue in this case is primarily a factual one: whether a miner proceeded under unsupported roof in the subject mine on December 18, 1985.[1]/ If he did, a violation is established, and the further issues whether the violation was significant and substantial, and whether it resulted from Respondent's unwarrantable failure to comply with the standard arise. Respondent has also raised the issue whether a "clean inspection" took place between the time the underlying (d)(1) citation was issued (March 29, 1984) and the date of the order contested herein. Finally, if a violation is established, an appropriate penalty must be assessed.

FINDINGS OF FACT

PRELIMINARY FINDINGS

Kanawha was the owner and operator of an underground coal mine in Boone County, West Virginia, known as the Madison No. 2 Mine. Kanawha produced 1,303,284 tons of coal in 1985; the subject mine produced 335,542 tons. In the 24 months prior to the contested order, there were 293 paid violations cited at the subject mine, including 39 violations of 30 C.F.R. § 75.200. This is a moderately serious history of prior violations considering the size of the mine.

The coal seam in the area of the mine involved in this case was aproximately 40 inches high. The roof was hard sandrock and was considered "good top."

A citation was issued on March 29, 1984 under section 104(d)(1) of the Act for failure to guard a tail pulley. A

1/ Respondent did not raise the issue whether it was proper to issue an order under section 104(d)(2) of the Act for an alleged violative condition that had been terminated prior to the inspection.. See Emery Mining Co., 7 FMSHRC 1908 (1985); Nacco Mining Company, 8 FMSHRC 59 (1986), review pending; Emerald Mines Corp., 8 FMSHRC 324, review pending; White County Coal Corp., 8 FMSHRC 921 (1986), review pending; Greenwich Collieries, 8 FMSHRC 1105 (1986), review pending. Since the issue was not raised or briefed, I do not decide it here.

withdrawal order was issued the same day under 104(d)(1) for an accumulation of loose coal. Government's Exhibit 4 establishes prima facie that a clean inspection was not conducted at the mine between the date of the above citation and order and the date of the order contested herein. Kanawha did not submit any evidence to refute the prima facie case.

THE CONTESTED ORDER

On December 19, 1985, Federal Mine Inspector Cooke came to the subject mine at approximately 7:15 a.m. to perform a regular inspection. He went into the mine with the day shift mantrip and proceeded to the 3 left section. He observed that the crosscut between entries one and two had been mined through and was partially roof bolted. Inspector Cooke measured the distance from the next to the last row of roof bolts in the crosscut inby the No. 2 entry to the deepest penetration of the continuous miner in the crossout left off the No. 2 entry. He found the distance to be 23 feet 4 inches. He then measured the distance from the cutting bits of the miner to the controls, and found this to be 20 feet 3 inches. He therefore concluded that the continuous miner on the previous shift had proceeded 3 feet 1 inch under unsupported roof. Inspector Cooke testified that the row of bolts inby the row (toward entry No. 1) from which he measured was not used because he concluded that it had been installed after the crosscut was mined through. He based this conclusion on the fact that the bolts and cover plates had an oily film present and had no coal dust deposits on them.

Inspector Cooke then issued a 104(d)(2) withdrawal order on December 19, 1985 at 10:00 a.m. for an alleged unwarrantable failure to comply with the roof control safety standard. He made the unwarrantable failure findings because he concluded that the section foreman should have been in the area while the crosscut left off the No. 2 entry has been mined, and should have prevented the miner from proceeding under unsupported roof.

The order was terminated on December 19, 1985 at 10:00 p.m. when the roof control plan was fully explained to all employees on the working section by the company Safety Director.

The section foreman, the continuous miner operator, and the roof bolter who worked the evening shift on December 18, 1985, all testified on behalf of Kanawha. No mining was performed on the subsequent midnight shift. Their testimony was consistent and tends to establish the following sequence of mining. The miner had begun cutting during the day shift in the crosscut right from entry No. 1. The evening shift completed the cut and backed the miner out of the crosscut back down the No. 1 entry to

the outby crosscut to the No. 2 entry then back up No. 2 to the crosscut where it began mining in the crosscut right between entries 2 and 3. The miner pushed through the crosscut. In the meantime, roof bolts were installed in the crosscut right between entries 1 and 2 where the cut had been made. When this was completed, the roof bolter was turned around, and its cable was damaged leaving the bolter inoperative in the No. 1 entry. The scoop was also broken down in the No. 1 entry. For these reasons, it was decided to begin to cut the crosscut left from the No. 2 to the No. 1 entry. However, the miner was unable to push through the crosscut without another row of bolts. The miner backed into the crosscut between entries 2 and 3. The roof bolting machine was repaired and installed an additional row of bolts in the crosscut left off No. 2 entry. It backed out and the miner finished cutting the crosscut. This occurred at the end of the shift. No further bolting was done in the crosscut during the evening shift, and no bolts were installed prior to the inspector arriving during the day shift. I have no reason to disbelieve the eyewitness testimony as to what happened on the evening shift of December 18, 1985, and, therefore, I accept it as factual. The absence of dust on the bolts and cover plates is not sufficient to establish that the bolts were not installed prior to the push through. The distance between the last row of bolts installed in the crosscut right off No. 1 and the last row installed in crosscut left off No. 2 was 19 feet 3 inches. I therefore find as a fact that the contiuous miner did not proceed under unsupported roof in the crosscut between entries 2 and 1 on December 18, 1985.

The Secretary argues that a violation occurred because the last bolt in the disputed row of bolts was 6 feet from the rib. This was not charged in the order and not raised until the hearing. In any event, I accept the testimony of the members of the crew on December 18 that a complete row of bolts (5) was installed in the crosscut.

CONCLUSIONS OF LAW

Kanawha was subject to the Act in the operation of the Madison No. 2 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

The evidence does not establish that Kanawha was in violation of 30 C.F.R. § 75.200 as charged in the order. Therefore, the order was issued in error, and no penalty can be assessed.

ORDER

Based on the above findings of fact and conclusions of law, IT IS ORDERED:

1. Kanawha's contest of order of withdrawal 2581293 is GRANTED.

2. Order 2581293 is VACATED.

3. The Secretary's Petition for the Assessment of a civil penalty is DISMISSED.

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
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FALLS CHURCH, VIRGINIA 22041

DEC 23 1986

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 86-153-R
v.	:	Order No. 2713988; 2/13/86
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Humphrey No. 7 Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 86-261
	:	A.C. No. 46-01453-03689
v.	:	Humphrey No. 7 Mine
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: Michael R. Peelish, Esq., Pittsburgh, Pennsylvania for Consolidation Coal Company (Consol); Therese I. Salus, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor (Secretary).

Before: Judge Broderick

STATEMENT OF THE CASE

Consol has challenged the issuance of an order of withdrawal on February 13, 1986, under section 104(d)(2) of the Federal Mine Safety and Health Act of 1977 (the Act). The Secretary seeks a penalty for the safety violation charged in the contested order. Because both dockets arose out of the same incident, they were consolidated for the purposes of hearing and decision. Pursuant to notice, the case was heard on October 7, 1986 in Morgantown, West Virginia. Joseph Baniak and David Laurie testified on behalf of the Secretary. Marvin Faulkner, Kent Isancnson, Stanley Brozik, and Harold Moore testified on behalf of Consol. Both parties were given the opportunity to file posthearing briefs. A brief was filed on behalf of Consol. The Secretary

did not file a brief. Based on the entire record, and considering the contentions of the parties, I make this decision.

FINDINGS OF FACT

1. At all times pertinent to this decision, Consol was the owner and operator of an underground coal mine in Monongalia County, West Virginia, known as the Humphrey No. 7 Mine.

2. Consol produces more than 37 million tons of coal annually. The subject mine produces almost 3 millions tons. Consol is a large operator.

3. During the 24 months preceding the order contested herein, there were 925 paid violations issued to the subject mine, 813 of which were designated significant and substantial. Included in that number were 130 violations of 30 C.F.R. § 75.400. One hundred twenty-three of these were designated significant and substantial. Although the number of paid violations is substantial, in view of the size of the mine and the number of inspection days, I conclude that the history of prior violations is moderate and I will not increase any penalty assessed herein because of prior history.

4. An order was issued to the subject mine under section 104(d)(2) of the Act on August 23, 1985. Consol did not raise the issue of an intervening clean inspection; therefore, I conclude that there was not a clean inspection between August 23, 1985 and February 13, 1986.

5. On February 13, 1986, Federal Inspector Joseph J. Baniak conducted a regular inspection at the subject mine. He proceeded to the 6-Butt section belt conveyor drive and take up areas. At about 10:00 a.m. on February 13, 1986, Inspector Baniak issued an order of withdrawal under section 104(d)(2) of the Act alleging a violation of 30 C.F.R. § 75.400.

6. I find that at the time the order was issued, the following conditions existed in the area: large accumulations of loose coal and coal dust, including float coal dust in suspension, existed under and around the belt and in and around the motor and electrical components. The accumulations extended approximately 100 feet inby the intersection and 50 feet outby. They were also present in 2 crosscuts. They extended from rib to rib along the entry. The accumulation around the belt drive motor was approximately 14 inches deep from the frames, and was packed up around the motor.

7. The accumulations were very dark in color and for the most part were dry. The belt was energized and was running at the time the order was issued.

8. On February 13, 1986, the preshift mine examiner's report called out shortly after 7:00 a.m. indicated that the 6-Butt drive needed additional dust.

9. The belt shoveler on the 6 Butt belt line read the preshift mine examiner's report and went into the mine to the 6-Butt section. He was prepared to add rock dust when he saw that two belt men were engaged in adjusting the rollers on the belt. The belt shoveler (also a fire boss) told the beltmen to complete their work adjusting the belt and he would return to dust the area when they finished. This occurred between 8:00 and 8:30 a.m. The belt was running while it was being adjusted. The belt shoveler then proceeded to shovel coal spillage some 300 feet down the belt line.

10. The hazard created by the condition found to exist in finding of fact No. 6 was the possibility of a mine fire or explosion. The large amount of the accumulations, the existence of float dust on electrical equipment and suspended in the air, and the existence of ignition sources in the power cables and the drive motor made the occurrence of a fire or explosion reasonably likely if the condition were allowed to continue.

11. Because of the extent of the accumulation, especially the coal dust packed around the motors, it is clear that it had existed for some time prior to the preshift examiner's report referred to in finding of fact No. 8. Consol was aware or should have been aware of the condition prior to the preshift examiner's report.

12. The air in the area of the violation was largely coming off the working section to the regulator and out of the mine. In the event of a fire, however, the regulator would likely have been disrupted, and the fire and smoke could travel in all directions including in the direction of the face.

13. Fire extinguishers were present at the 6-Butt belt conveyor drive. An automatic fire supression unit was present over the belt drive. There was also a fire hose with a water outlet. Fire sensors were present over the belt drive and every 125 feet along the belt.

14. Methane is not liberated in the area of the mine where the violation was cited.

15. A sample was taken by Consol from a trough in front of the belt drive motors. It was tested and found to be 70 percent incombustible.

16. After the order was issued, ten to twelve men were assigned to clean and rock dust the area. Some of the rock dusting was done by hand and some by machine. The condition was abated, and the order terminated at about 11:55 a.m., February 13, 1986.

REGULATION

30 C.F.R. § 75.400 provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

ISSUES

1. Whether the condition found to exist in finding of fact No. 6 was a violation of 30 C.F.R. § 75.400?

2. If so, whether the violation was significant and substantial?

3. If so, whether the violation resulted from Consol's unwarrantable failure to comply with the standard?

4. If so, what is the appropriate penalty for the violation?

CONCLUSIONS OF LAW

1. Consol is subject to the Act in its operation of Humphrey No. 7 Mine, and I have jurisdiction over the parties and subject matter of this proceeding.

2. The accumulation of loose coal and coal dust, including float coal dust referred to in finding of fact No. 6 was violative of 30 C.F.R. § 75.400. Loose coal and coal dust was permitted to accumulate in active workings and on electric equipment, and was not cleaned up until after the withdrawal order was issued.

3. The extent of the accumulation, its proximity to ignition sources, and especially the extensive amount of float coal dust, made the occurrence of a fire or explosion reasonably

likely. The violation was very serious. In the words of walk-around miner Laurie, "In my opinion it was pure gun powder on top of rock dust." (Govt. Ex. 4) I am accepting the testimony of Inspector Baniak and John Laurie over the conflicting testimony of Marvin Faulkner and Kent Isancnson regarding the extent of the accumulation. I discount the evidence of the incombustible content in the sample taken by Consol. It was a single sample taken by hand, and there is no evidence that it was representative of the acumulations in the area.

4. The condition had been present for some time--certainly during the prior shift. I conclude that Consol's failure to clean up the accumulations constituted a serious lack of reasonable care. See U.S. Steel Corp. v. Secretary, 6 FMSHRC 1423 (1984). Therefore the violation was the result of Consol's unwarrantable failure to comply with the standard.

5. There is no evidence that the imposition of a penalty will affect Consol's ability to continue in business.

6. Consol abated the condition promptly and in good faith after the issuance of the order.

7. Considering the criteria in section 110(i) of the Act, I conclude that a penalty of $1000 is appropriate.

ORDER

Based on the above findings of fact and conclusions of law, IT IS HEREBY ORDERED:

1. The notice of contest of order No. 2713988 is DENIED.

2. Order No. 2713988 issued February 13, 1986, including the special findings that the violation was significant and substantial and caused by Consol's unwarrantable failure, is AFFIRMED.

3. Consol shall within 30 days of the date of this order pay $1000 as a civil penalty for the violation found herein.

James A. Broderick
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 24 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. LAKE 86-123 A.C. No. 11-00784-03592
v.	:	Mine No. 21
SAHARA COAL COMPANY, INC., Respondent	:	

DECISION APPROVING SETTLEMENT

Before: Judge Broderick

On December 18, 1986, the Secretary of Labor filed a motion for approval of a settlement reached by the parties in this case. The violations were originally assessed at $1600 and the parties propose to settle for $1005.

Three citations are included in this docket. The first two charge Respondent with failing to immediately report an explosion and a roof fall which disrupted ventilation. The third charges a failure to conduct an adequate preshift examination. With respect to the nonreporting violations, the motion states that Respondent's negligence was low: it was clear that a roof fall occurred, but not that an explosion occurred. It was only after a two month investigation that MSHA determined that it was an explosion. The roof fall was immediately reported and although the ventilation disruption was not reported, the MSHA inspector came to the mine and could observe that the ventilation was disrupted. The motion proposes to reduce the penalties from $200 and $400 to $105 and $300 respectively. With respect to the preshift examination the motion states that an adequate preshift examination was performed, but that the methane or carbon monoxide must have built up after the examination. The negligence is therefore rated low, and the motion proposes to reduce the penalty from $1000 to $600.

I have considered the motion in the light of the criteria in section 110(i) of the Act, and conclude that it should be approved.

Accordingly, the settlement is APPROVED and Respondent is ORDERED TO PAY the sum of $1005 within 30 days of the date of this order.

James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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FALLS CHURCH, VIRGINIA 22041

DEC 24 1986

CONSOLIDATION COAL COMPANY, Contestant	:	CONTEST PROCEEDING
	:	Docket No. WEVA 85-183-R
v.	:	Citation No. 2222286; 4/11/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Blacksville No. 2 Mine
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. WEVA 85-236
	:	Blacksville No. 2 Mine
v.	:	
CONSOLIDATION COAL COMPANY, Respondent	:	

DECISION

Appearances: William T. Salzer, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, for Petitioner; Michael Peelish, Esq., Consolidation Coal Company, Pittsburgh, PA, for Respondent

Before: Judge Fauver

Consolidation Coal Company (hereafter "Consolidation") seeks to vacate a citation charging a safety violation, and the Secretary of Labor seeks a civil penalty for the violation charged, under the Federal Coal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the reliable, probative, and substantial evidence establishes the following:

FINDINGS OF FACT

1. Consolidation owns and operates Blacksville No. 2 Mine, which produces coal for sale or use in or affecting interstate commerce.

2. Consolidation is a large coal operator, producing over 10,000,000 tons a year.

3. On April 11, 1985, MSHA Electrical Inspector Spencer Shriver issued Citation 2222286 charging a violation of 30 C.F.R. § 75.807.

4. The citation alleges the following condition or practice:

> The 7200 volt cable serving the 5 North Section Power Center, is laying on the bottom for 25 feet, beside area of new track construction, in No. 5 entry, outby belt trench. Cable is contacting a 5 foot drill steel leaning against rib, and is heavily abraided for about 6 feet where it passes around the corner of the intersection inby the belt trench. About 20 feet of cable is laying on the bottom, near Bantam Duster, and across entry from power center cable has 3 cuts, 1/8 inch deep and 1/2 to 2 inches long, and is abraided, where it hangs down from crossing No. 5 entry, and into high-voltage sled. Area is under construction and the cable has received mechanical damage at corner of intersection and at high-voltage sled, and is subject to mechanical damage at the two locations where it was laying on bottom. These conditions were easy to observe.

5. The cited safety standard states in pertinent part:

> All underground high-voltage transmission cables shall be installed only in regularly-inspected air courses and haulageways, and shall be covered, buried, or placed so as to afford protection against damage, guarded where men regularly work or pass under them unless they are 6 1/2 feet or more above the floor or rail, securely anchored, properly insulated ....

6. The electrical inspector came into the area along the number 5 entry. He passed the recess where the power

sled and power center were located. He proceeded up the entry and through the intersection where an overcast had recently been cut. He then walked approximately 75 feet outby the intersection to where the track ended.

7. Inspector Shriver observed that the cable was hanging low as it came out of the power sled into the entry. It was approximately three feet from the ground. He noticed three cuts on this part of the cable. He also noticed handprints in the rockdust on this part of the cable. Given the handprints on this part of the cable, but not elsewhere, and the eighteen inch step up to the power sled and center, it appeard to him that the cable was being used as a handrail or hoist to and from the power center.

8. The 7200 cable crossed over the entry at this point and was hung against the roof. When it came down on the opposite side of the entry, there were approximately 25 feet of cable looped and lying on the ground next to a bantam duster.

9. The cable then ran along the ribs of the entry close to the roof. It went over the intersection tight against the top of the overcast. When it came down the other side of the intersection, it was wrapped tightly around the corner of the intersection, approximately three or four feet off the ground. There were heavy abrasions on the six feet of the cable that were wrapped around the corner.

10. These abrasions were on the side of the cable that faced the intersection. Given the height of the cable and the concentration of heavy abrasions on this corner, it appeared to the inspector that the cable was being scraped and damaged by machinery or equipment traveling around or through the intersection.

11. Once the cable rounded the corner of the intersection, it was then wrapped around a drill steel that was leaning against the rib.

12. The next fifty feet of the 7200 cable along the entry was hanging less than six and a half feet from the ground. Ten feet of that was guarded. The other forty feet were unguarded.

13. The next twenty five feet of cable were lying on the ground near the rib. This area was at the end of the track. At the end of the track and next to the cable on the ground, there were cross ties and rails that had been unloaded where supplies are dropped off. There were also

several pieces of metal lying within two or three inches of the cable. There were three pieces of metal measuring about four feet long and four inches wide.

14. Upon entering the area, the electrical inspector had observed a crew bolting in the cross cut area between the number four and five entries. He observed the section foreman, Mr. Stone, in the same vicinity as well.

15. After the inspector indicated that a citation was being issued, the 7200 cable was de-energized. The electrical inspector went back and looked more closely at the cuts on the cable near the power sled. Using his fingernail, he estimated that the cuts were one eighth of an inch in depth and varied from one half to two inches long. It was the inspector's opinion that these cuts were more than normal wear and tear and amounted to serious damage to the outer jacket.

16. The way in which the 7200 cable was hung and placed in this area of the number 5 Entry was readily observable. The damage to the cable at the power sled and on the corner of the intersection was also readily observable. The inspector made his observations of the area in a matter of minutes. The potential for further damage was obvious at the corner of the intersection and the end of the track.

17. The 7200 cable had been in this positon from the time the power center was moved to its location, within the last several days. It was Inspector Shriver's opinion that the cable had been in this condition for two to three days based on his observation of the area. He believed that the overcast was cut several days before. There was also rock dust settled on the cable and there were no emptly bags in the area, indicating the cable had been in this position for several days.

18. The area is required to be examined by the section foreman during pre-shift and on-shift examinations. Section Foreman Stone had done an on-shift examination of this area at approximately eight o'clock that morning. A pre-shift had been done by the last boss on the midnight shift.

19. If left in this position, the cable would have been subjected to further damage and it was reasonably likely that a short circuit would have occurred.

20. When a 7200 cable is damaged, a short circuit or exposed conductors can result. If a person contacts an energized conductor, he would almost certainly be electrocuted given the voltage of this cable. A short circuit can

result in fire, explosion or electrocution. Water or moisture can get into a cable through the damaged area and result in an explosion.

21. The cuts and abrasions on the cable constituted damage. The six feet of abraided cable at the intersection was subject to further damage. The twenty five feet of cable on the ground near the end of the track was subject to damage from supplies and other materials being dropped on the cable.

22. This area was regularly traveled and worked in by miners. It was a construction area. The track and power center were located in this entry.

23. Because of the high voltage of the 7200 cable, it has a number of safety features in its overall protection system. Each of the three conductors or phase wires in the cable is covered with shielding. The shielding is covered with insulation. Then there is another braided or tape shield covered by the outer jacket. Any amount of damage to the cable could affect the overall protection system of the cable. If the cable is damaged through to the conductors, the breaker would be tripped and the cable de-energized if the ground monitoring system is functioning properly. If it is not functioning properly at the time, the breaker would not be thrown. An attempt might be made to reset the breaker even when it has been thrown off. If the object that penetrated the inner cable was removed the power would remain on and a short circuit would result.

24. In the event that these hazards occurred, very serous injuries would result given the frequency with which this area is traveled and worked in. Serious injuries from burns and flying debris would result. A fatality could result from electrocution.

25. The electrical inspector did not require the cable to be repaired or replaced in order to abate the violation. All that was required was hanging the cable near the roof in all locations so that it would not be subjected to contact or further damage. This was done within approximately one hour. Since the damage to the cable did not penetrate beyond the outer jacket and it was protected from further damage, the area was made safe.

DISCUSSION WITH FURTHER FINDINGS

The standard cited is a broad safety regulation regarding the installation of high voltage transmission cables. The intent of § 75.807 clearly is to protect

high-voltage cables against damage and to protect miners against contact with high-voltage cables.

Consolidation violated the section by its failure to cover, bury or place the 7200 cable in the 5 North Section so as to afford protection against damage. The cable was damaged at two places: near the power sled and at the corner of the intersection. Also, the twenty five feet of 7200 cable outby the intersection near the end of the track was not protected against damage from various types of supplies being unloaded there. Pieces of metal debris in the area could have caused damage to the cable as well. The operator also violated the standard by its failure to guard the cable where it hung less than six and a half feet since this is an area where miners regularly worked. Little Bill Coal Company, 2 FMSHRC 3634, 3642-3643 (December 1980).

The violation was caused by the operator's "unwarrantable failure" to comply. An unwarrantable violation may be proved by:

> . . . a showing that the violative condition or practice was not corrected or remedied, prior to the issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care. [United States Steel Corp., 3 FMSHRC 1424, 1434 (1984).]

The fact that the 7200 cable was put in this position after the overcast was cut and no action was taken to hang the cable or protect it from damage demonstrates indifference or a serious lack of reasonable care. Given that this area is required to be examined during pre-shift and on-shift by the section foreman, and the damage to the cable and potential for further damage was not observed nor acted upon, indifference or a serious lack of care has been also shown.

The violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety and health hazard in this mine. As stated by the Commission in Mathies Coal Company, 3 FMSHRC 1184 (1984), in order to establish that a violation is "significant and substantial," it must be shown that there was: (1) an underlying violation of a mandatory safety standard, (2) a discrete safety hazard, that is, a measure of danger to safety contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Damage to the outer jacket of a cable, even a small tear, weakens the overall system of protective insulation and

increases the risk of danger to the internal layers of insulation on the power conductors. The fact that the cable was damaged and subject to further damage increased the likelihood of the hazards of electrocution, fire or explosion. A short circuit or exposed conductors were likely to have occurred. In addition, water or moisture could have seeped through damaged areas and caused a short circuit and explosion. Given that this construction area was regularly traveled and worked in, injury was reasonably likely.

In the event that one of the hazards occurred, very serious injuries would have been reasonably likely. Serious or even fatal injuries would result from electrocution, burns and flying debris.

Considering all the criteria for assessing a civil penalty under section 110(i) of the Act, I find that a penalty of $750 for this violation is appropriate.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. Consolidation Coal Company violated 30 C.F.R § 75.807 as charged in Citation 2222286.

ORDER

WHEREFORE IT IS ORDERED that:

1. Citation 2222286 is AFFIRMED.

2. Consolidation Coal Company shall pay the above-assessed civil penalty of $750 within 30 days of this Decision.

William Fauver
William Fauver
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DEC 31 1986

SOUTHERN OHIO COAL COMPANY, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 86-8-R
v.	:	Citation No. 2557030; 9-10-85
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. WEVA 86-9-R Order No. 2564405; 2-10-85
	:	Docket No. WEVA 86-11-R
	:	Order No. 2564943; 9-17-85
	:	Docket No. WEVA 86-35-R
	:	Order No. 2564613; 10-10-85
	:	Docket No. WEVA 86-36-R
	:	Citation No. 2564615; 10-10-85
	:	Docket No. WEVA 86-37-R
	:	Citation No. 2564821; 10-9-85
	:	Docket No. WEVA 86-38-R
	:	Order No. 2705721; 10-16-85
	:	Docket No. WEVA 86-39-R
	:	Citation No. 2705722; 10-16-85
	:	Docket No. WEVA 86-47-R
	:	Citation No. 2705729; 10-21-85
	:	Docket No. WEVA 86-48-R
	:	Order No. 2706704; 10-22-85
	:	Docket No. WEVA 86-49-R
	:	Citation No. 2706709; 10-22-85
	:	Docket No. WEVA 86-154-R
	:	Order No. 2706772; 2-5-86
	:	

SECRETARY OF LABOR, MINE SAFETY AND HEALTH, ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. WEVA 86-30
	:	A.C. No. 46-03805-03685
v.	:	Docket No. WEVA 86-42
	:	A.C. No. 46-03805-03686
SOUTHERN OHIO COAL COMPANY, Respondent	:	Docket No. WEVA 86-51
	:	A.C. No. 46-03805-03688
	:	Docket No. WEVA 86-54
	:	A.C. No. 46-03805-03687
	:	Docket No. WEVA 86-71
	:	A.C. No. 46-03805-03690
	:	Docket No. WEVA 86-75
	:	A.C. No. 46-03805-03692
	:	Docket No. WEVA 86-102
	:	A.C. No. 46-03805-03700
	:	Docket No. WEVA 86-264
	:	A.C. No. 46-03805-03722

DECISION

Appearances: David M. Cohen, Esq., and David A. Laing, Esq., American Electric Power Service Corporation, Lancaster, Ohio, for Southern Ohio Coal Company; Susan Jordan, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary of Labor.

Before: Judge Fauver

Southern Ohio Coal Company seeks to have certain orders and citations vacated, and the Secretary seeks to have them affirmed and civil penalties assessed for violations charged in them, under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq.

Having considered the hearing evidence and the record as a whole, I find that a preponderance of the substantial, reliable, and probative evidence establishes the following:

FINDINGS OF FACT

WEVA 86-9-R and WEVA 86-30

1. Settlement proposed at the hearing was GRANTED. Order 2564405 will be AFFIRMED and a civil penalty of $600 is APPROVED.

WEVA 86-37-R and WEVA 86-42

2. Settlement proposed at the hearing was GRANTED. Citation 2564821 will be AFFIRMED and a civil penalty of $137 is APPROVED.

WEVA 86-39-R and WEVA 86-51

3. Settlement proposed at the hearing was GRANTED. Citation 2705722 is VACATED and the Petition for Civil Penalty will be DISMISSED.

WEVA 86-11-R and WEVA 86-75

4. Settlement proposed at the hearing was GRANTED. Order 2564943 will be AFFIRMED and a civil penalty of $400 is APPROVED.

WEVA 86-38-R and WEVA 86-102

5. Settlement proposed at the hearing was GRANTED. Order 2705721 will be AFFIRMED and a civil penalty of $550 is APPROVED.

WEVA 86-36-R and WEVA 86-54

6. Citation 2564615 was issued on October 10, 1985, by MSHA Inspector David Workman when he observed that the off-track shuttle car roadway in 3 Butt Section had excessive mud.

7. The area affected was 180 feet inby the belt feeder including the entire four way intersection. The mud measured approximately twelve to sixteen inches in depth. The wet and muddy conditions made the steering of the shuttle cars difficult.

8. "A Notice to Provide Safeguards" had been issued on September 10, 1974, requiring that off-track haulage roadways "be maintained as free as practicable from bottom irregularities, debris, and wet or muddy conditons." It was still in effect at the time that the subject citation was issued.

9. The large accumulations of mud could affect the control of equipment driven through this area.

10. The muddy conditions could have contributed to the cause and effect of a serious accident.

11. For abatement of the cited condition, the area was made safe by running a scoop through and removing the accumulation of mud.

WEVA 86-35-R and WEVA 86-102

12. On October 10, 1985, Order 2564613 was issued by MSHA Inspector David Workman when he observed that two brows of a boom hole in the roof of No. 4 entry of the 3 Butt section were not supported adequately.

13. The boom hole had been cut in the entry during the midnight shift of October 9, 1985. The area was being prepared as a belt transfer or dumping point. The hole was about three feet high and nineteen and one-half feet wide.

14. After the boom hole was cut, additional roof bolts were put in the top of the cavity of the hole. No new bolts were placed on any of the four brows of the boom hole. The bolts on the brows were there before the roof was cut.

15. On two sides of the boom hole a row of bolts was very close to the edge of the brows. The bolt plates were up to the edge. These bolts provided adequate support to two sides.

16. On each of the other two sides of the boom hole inby a row of bolts was much farther from the edge of the brow. On the right side, the bolts were 1' 2", 2', 1' 8" and 2' 2" from the edge. On the left side, the measurements were 2', 2' 5" and 2' 5". Inspector Workman and David Antock, the miners' representative, took these measurements at the time the order was issued.

17. The roof control plan for this mine does not provide specifically for the support of boom holes. However, it is a well established practice in the mining industry that roof support be provided as close to the edge of a brow of a boom hole as possible.

18. The lack of roof bolts near the edge resulted in two exposed areas of roof approximately fifteen and one half feet long and two and a half feet wide.

19. At the time of the order there was no imminent danger of a roof fall. However, given the size and weight of the unsupported areas, the type and history of the slate roof in this mine, and the heavy vibrations the area was subject to, it could reasonably be expected that parts or all of the exposed roof areas would fall at some point and result in serious injuries.

20. The bolting pattern was readily observable. The section foreman did not require the roof bolters to put additional bolts on the brows and ensure that the area was supported properly after the boom hole was cut. Furthermore, this area is required to be examined during pre-shift and on-shift examinations. The section foreman did not report that the brows were not adequately supported during any subsequent examination of the area.

21. For abatement of the cited condition, the area was made safe by installing bolts on the brows closer to the edge. This took approximately one-half hour.

WEVA 86-48-R and WEVA 86-102

22. Order No. 2706704 was issued on October 22, 1985, by MSHA Inspector David Workman when he observed a large piece of loose roof on the B-6 longwall section supply track inby the pumping station 150 feet.

23. The piece of loose slate roof was about 5 feet long, 30 inches wide and 4 inches thick. There was a gap between the remaining roof and the loose rock of one half to one inch for the entire length of the loose slate. The loose piece of roof could have fallen at any time.

24. The condition of the loose roof was obvious and very dangerous. The gap between the roof and rock could be observed when approaching from either direction.

WEVA 86-49-R and WEVA 86-71

25. Citation No. 2706709 was issued on October 22, 1985, by MSHA Inspector David Workman when he observed an unguarded opening on a tail gate motor on the B-6 Longwall which exposed moving parts of the fluid coupler.

26. The unguarded opening was 1-3/4 inches by 1-1/2 inches and large enough that a person's fingers could fit through it. The opening was located on the side of the coupler approximately two feet from the ground.

27. The exposed moving parts of the coupler moved at 1785 RPM.

28. There was a reasonable probability of tripping in the area of the coupler in that the coupler was located in the walkway along the face conveyor which contained refuse, bottom irregularities and a number of rams that had to be stepped over.

29. There was a substantial risk that someone would accidentally put a finger or fingers into the opening and suffer a serious injury. To abate the condition, the opening was guarded by fixing a piece of rubber belting over the hole.

WEVA 86-154-R and WEVA 86-264

30. On February 5, 1986, Order No. 2706772 was issued by MSHA Inspector Harry Markley based upon his finding that a safe means of access was not provided and maintained to the power center located at the Grassy Run portal.

31. The MSHA inspector and union walkaround observed wet, muddy and rocky conditions in the pathway that was used around the power center.

32. The walkway in front of the power center consisted of approximately eight feet of flat area. In this area the mud was knee deep in places and extremely slippery.

33. The pathway around the left side of the power center to the back consisted of a two foot rocky and muddy walkway along the power center and the dangered-off power cables for a distace of approximately forty feet.

34. From the edge of the power center walkway toward the open pit there was an increasing downward slope ending in a vertical highwall. The slope was 3 degrees for about 10 feet, then there was a slope of 22 degress for about 12 feet, followed by a slope of 27 degrees for about 16 feet, ending in a sharp highwall that dropped vertically about 11 to 15 feet.

35. At least part of the two foot wide walkway between the power center and slope would need to be used in order to access the left back side of the power center where the power

plugs were located. If someone came around the front of the power center, he would have to walk along the two foot wide path between the power center and pit to reach the power switches on the left back side. In the event he came around the back, he would need to walk around the power cables that were staked and wired off and then up the two foot path along the power cables to the left back side of the power center where the switches for the cables were located.

36. Due to weather conditions that time of year, the walkway around the power center was extremely wet and muddy. The slope between the pathway and vertical highwall was also muddy and not safe to walk on.

37. Access to the power center would be required at least twice a shift to energize the cables at the start of the shift and de-energize them at the end of the shift. If any problems with equipment were encountered during a shift, personnel would be required to travel to the power center more often to remove the power. Whenever a piece of equipment would break down, the power would have to be removed from the equipment to work on it.

38. The MSHA inspector and union walkaround observed two men working on the power center during the time that they were in this area. They were electricians who were repairing a problem with a ground fault system.

39. The power center had been in this location and in operation for approximately two to five days before the MSHA order was issued.

40. This area is required to be examined daily during on-shift examinations by certified personnel. The assistant shift foreman, John Vevilock, was responsible for this area and had conducted the on-shift examination that day. He was also working in the area at the time the order was issued.

41. The wet, muddy, rocky conditions in the walkway along side of the power center and trailing cables presented a slipping hazard.

42. The conditions around the power center presented a serious hazard that someone could stop or fall in the walkway and continue slipping down the incline into the pit below. A person falling down the slope and over the highwall could be seriously injuried or killed.

43. All that was required to make the area safe was a guard rail or barrier to prevent a person from falling in the first place and keep him from slipping down the slope over the highwall in the event that he did slip and fall. The operator built a platform with guard rails between the power center and slope by the next day.

WEVA 86-8-R AND WEVA 86-75

44. On September 10, 1985, Citation 2557039 was issued by MSHA Electrical Inspector John Paul Phillips for a violation of 30 C.F.R. § 75.503 on a five horsepower Flygt pump located in the face of the Number One heading on 1 North off 2 West Section.

45. The citation stated that the pump was not maintained in permissible condition in that an input power cable to the controller was not entered through the entrance gland. In addition, the citation stated that the cable had been pulled out of the packing gland and only insulated wires were through the gland.

46. The operator does not contest that a violation of 30 C.F.R. § 75.503 existed in that the input cable did not go completely through the packing gland of the controller. The operator does contest, however, the special findings of an unwarrantable, significant, and substantial violation.

47. The inspector entered the area to inspect the controller because of problems he had observed with other similar controllers in this mine. He was accompanied by Pat Grimes, union walkaround, and Kenney Moore, company representative. The inspector immediately observed that the controller was hung by its two cables which were looped on j-hooks in the roof.

48. It is recognized that the normal mining practice is to hang these control boxes from the roof by their handles which are on top of the boxes or by bolting brackets on the back.

49. The control box in question may or may not have had a handle on it, but it did have bolting brackets for mounting.

50. It is not considered good mining practice to hang the controller by its cables because strain is put on the input cables by the weight of the box. The control box itself weighs approximately thirty pounds.

51. The electrical inspector asked the union walkaround, Mr. Grimes, who is also a certifed electrician, to take the controller down. As Mr. Grimes was about to do this, he noticed that one of the input cables was pulled out of the box. He specifically observed the insulated colored leads through the slot between the straining clamp and the outside of the box. He observed that the black cover of the cable did not go completely through the straining clamp into the control box. Mr. Grimes pointed out his observations to the inspector.

52. Once the controller was on the ground, the cover was removed by Mr. Grimes. The fact that the input cable did not pass completely through the wall of the controller, as is required, was confirmed. In addition, the inspector observed two other violations in the controller. These violations involved inadequate overcurrent protection and ground monitoring system. These violations were the conditions that the inspector was concerned with when entering the area because of similar findings on other controllers. The inspector issued citations for violations of 30 C.F.R. § 75.518 and § 75.902 for these conditions at the same time he issued the order at bar.

53. With respect to the citation at issue, the inspector and union walkaround observed that the input cable went to the straining clamp on the outside of the box but did not go through the packing gland. The packing gland consists of packing material made of asbestos between two rings. The input cable had to extend through the packing gland and into the controller in order to be permissible. It is uncontested that the input cable did not go through the packing gland.

54. The fact that the input cable itself did not extend through the packing gland and into the box was observable without the cover off since the colored leads of the cable could be observed coming out of the box in the small space between the outside of the box and the straining clamp.

55. Mr. Grimes, a certified electrician, attempted to enter the cable back into the control box. However, the cable would not fit through the inner ring of the packing gland. Mr. Grimes took the whole packing gland out of the box. It was apparent to him and the inspector that while the input cable could fit through the ring closest to the outside, it would not fit through the ring toward the inside of the box.

56. Given the manner in which the control box was hung from its cables on j-hooks and the weight of the box itself, the pressure on the cable had caused the cable to slip farther back from the packing gland and exposed colored leads on the outside of the box. While the straining clamp was tight, it was not so tight as to prevent any movement of the cable. The straining clamp could not be too tight or it would affect the conductors inside.

57. Due to the fact that the input cable could not be entered completely through the packing gland and the existence of the other violative conditions that were cited, the operator made a decision to take the pump and its controller out of service and remove it to the outside of the mine.

58. When the control box was taken outside, it was not in the same condition as when it was first observed by the inspector, because attempts had been made to enter the cable through the packing gland into the box. Specifically, the colored leads could no longer be seen on the outside of the box.

59. The purpose of the pump was to dewater the face area in the section. It was energized at the time the inspector entered the area.

60. The pump and its controller are required to be examined during weekly permissibility inspections. The pump had been examined during a permissibility inspection by a certified electrician on September 8, 1985, two days before the citation was written.

61. In addition, this equipment is subject to daily examination during pre-shift examinations by the section foreman. The violative condition was not observed during any permissibility or pre-shift examinations.

62. The manner in which the controller was hung by its cables was easily observable. It is not a normal mining practice because of the strain put on the cables. The way the controller was hung should have resulted in closer examinations during pre-shift and particularly in permissibility inspections to make sure the cables were not pulled out of the explosion proof box. Closer examination would have resulted in observation of the exposed colored leads on the outside of the box.

63. Permissibility standards require that the input cable extend completely through the packing gland into the control

box so that no spark, fire, or explosion can escape the explosion-proof box. Given that the cable did not go through the packing gland and that there were other violations found in the control box, it could reasonably be expected that a fire, explosion or even spark would not be contained and could result in a mine fire or explosion. Serious injuries or even fatalities would be likely to result from burns or smoke inhalation.

DISCUSSION WITH FURTHER FINDINGS

WEVA 86-36-R AND WEVA 86-54

Citation 2564615 was issued by the inspector when he observed excessive mud in an off-track shuttle car roadway. The area cited was 180 feet inby the belt feeder and included a four way intersection.

The standard cited, 30 CFR § 75.1403, provides the authority to issue and enforce special safeguards regarding transporation in coal mines when an MSHA official determines that they are needed. It reads:

> Other safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.

Safeguards written and approved under this section have the force and effect of a mandatory safety regulation. Following this section are general criteria to be used in promulgating special safeguards. Section 75.1403-10(i) contains criteria regarding off-track haulage roadways. It specifically provides:

> Off-track haulage roadways should be maintained as free as practicable from bottom irregularities, debris, and wet or muddy conditions that affect the control of the equipment.

A "Notice to Provide Safeguard" was issued at this mine on September 10, 1974, by MSHA Inspector Raymond Strand. The Safeguard contains language identical to § 75.1403-10(i). This safeguard was in effect at the time that the citation was issued.

I find that the off-track roadway was not maintained as free as practicable from wet and muddy conditions that could affect the control of the equipment. Inspector Workman issued the citation after observing what he believed were excessive amounts of mud in a four way intersection. He stated that he did not specifically measure the depth of the mud or the size of the area affected, but that he walked around the area and walked out into the mud until it reached the top of his boots. He estimated that the mud was 12 to 16 inches deep and possibly up to 20 inches in places. He also testified that the entire intersection was affected and measured approximately 16 x 16 feet.

David Antock, the union representative who accompanied Inspector Workman during his inspection, corroborated his observations. He testified that the mud would have been over his boots if he walked out into it.

Respondent contends that the muddy conditions were not as bad as described by Inspector Workman and Mr. Antock. However, none of Respondent's witnesses actually measured the accumulations. Also, Inspector Workman was the only person who actually walked out toward the middle of the roadway. Mr. Antock observed him do this and saw him back out when the mud reached the top of his boots.

Both Inspector Workman and Mr. Antock testified that the muddy conditions would affect the control of a shuttle car. Both men have had significant experience operating shuttle cars and Mr. Antock worked as a shuttle car operator in this mine and had driven a shuttle car in this particular section as recently as a few days before the citation was written.

Inspector Workman and Mr. Antock observed a shuttle car operator in the area trying to clean out his car. The mud had come over the deck and into the car itself. Mud was observed around the tram handles and brakes. The mud would have to be at least six inches deep to come over the deck. Both felt that it would be extremely difficult to operate a shuttle car through the area without sliding. Accumulation of mud to this extent gets underneath and inside the car and affects the control and braking of the vehicle.

The violation was abated by scooping the mud out of the roadway. Mr. Antock, who was working on this section at the time of the hearing, indicated that cleaning up one to two times per shift is sufficient to keep the area clean and safe. He testified that recently the area was being scooped once at

the beginning of the shift and once at the end and that the shuttle cars were not having problems through there. It takes about fifteen minutes to scoop the area when done on a regular basis.

The violation was significant and substantial. It was reasonably likely or reasonably foreseeable that a shuttle car traveling through the muddy conditions would slip and result in serious injuries to the operator or others in the area.

Considering the criteria of section 110(i) for civil penalties, the proposed penalty of $157 is found appropriate for this violation.

WEVA 86-35-R and WEVA 86-102

Inspector David Workman issued Order 2564613 on October 10, 1985, pursuant to § 104(d)(2) of the Act. He was conducting a regular inspection of the Martinka No. 1 Mine when, while proceeding through the No. 4 entry of the 3 Butt Section, he observed two brows of a boom hole that, in his opinion, were not supported adequately.

The standard cited is a broad safety regulation regarding roof control programs and plans. The part cited by the inspector and at issue here reads:

> Each operator shall undertake to carry out on a continuing basis a program to improve the roof control system of each coal mine and the means and measures to accomplish such system. The roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.

The Secretary maintains that the operator violated 30 CFR § 75.200 in that the brows of the boom hole were not supported adequately to protect against a roof fall.

I find that the inspector was correct in his conclusion that a violation existed based upon his observations. Inspector Workman observed the recently cut boom hole as he was traveling through the crosscut. He learned that it had been cut out with a continuous mining machine the day before and that this area was to be a belt transfer or dumping point. The

cavity that was cut out to make the boom hole measured approximately three feet high by nineteen and a half feet wide. The boom hole was cut up into the roof and out to existing bolts. The hole was cut far enough out so that two sides had a row of bolts within several inches of the edge. However, the other two sides inby had bolts much farther from the edge. The bolts on the right side of the boom hole were 1' 2", 2', 1' 8" and 2' 2" from the edge and the bolts on the left side were 2', 2' 5" and 2' 5" away from the edge of the brow. The only new bolts installed were put in the top of the cavity.

Based on his observations, as well as his knowledge of this mine and his own experience, Inspector Workman found that the area had not been rebolted properly after the boom hole was cut. David Antock, the union representative who accompanied the inspector, agreed that the roof area had not been supported adequately.

Inspector Workman has been an MSHA inspector for fifteen years with a total of twenty three years of mining experience. He has had special training in roof control as an MSHA inspector. He has been conducting MSHA inspections at Martinka No. 1 Mine since 1977. Mr. Antock, the miners' representative, has worked at this mine for six years and for the last four years he has been a roof bolter in the section involved. Their opinions are accorded substanial weight based on their testimony, demeanor on the stand and their background. It is a recognized and well accepted practice in the underground coal mining industry that when a boom hole is cut out of the roof, the brows are supported by bolting as close to the edge as reasonably possible. Mr. Antock stated several times during his testimony that he has been told to bolt as close to the edge of the brow as possible by every foreman he has worked for as a roof bolter. He stated that he "would have bolted at the end of the brow...[f]or the reason that it keeps falling out, and that's where we've always been told..."

In the opinions of Inspector Workman and Mr. Antock, the distances between the bolts and the edge of the brow were too great to provide adequate support to the immediate area. The result was two exposed areas of unsupported roof measuring 15 1/2' x 1-1/2' on the right and 15-1/2' x 2-1/2' on the left side. Both men agreed that all of the bolts on the brow should have been within two feet to provide adequate support and the closer the better.

Respondent's witnesses recognized that bolting closer to the brow provides better roof support. Mr. Jon Merrified, the

Respondent's Safety Director, stated that the bolts should be near the edge of the brow and "'near'" is not ten feet. 'Near' is not five feet. 'Near' could be somewhere in the vicinity of two feet, in my best judgment. And that's the way I would want to see it done, also." (June 19, 1986, Tr. 14.) He went on to comment that on average, boom hole bolts are placed "around one foot, four inches" from the edge of the brow and that "I would not have been satisfied if they weren't in the two to one and a half foot range." (June 19, 1986, Tr. 30.)

In addition to his knowledge of standard mining practice, Inspector Workman based his opinion on observations of the area and history of the roof of the mine. Although he did not observe any exessive breakage or cracks that would have signified an imminent danger, he did see several small loose pieces that he pulled down himself. Also, he was aware that the slate roof in this mine had a history of instability given its weight and lack of "interlocking" effect. He felt that given the weight of the slate rock on the unsupported brows, the roof would become loose, crack and fall. Mr. Antock stated that the roof has "never been stable there" and that a fall would have occurred if the roof were left in that condition without added bolts.

It should be noted that all that was required to make the area safe was several additional bolts on each of the two sides. It took approximately one half hour for a roof bolter to put in the new bolts.

The regulation, 30 CFR § 75.200, requires adequate roof support. The order was issued because the inspector observed roof conditions which required additional roof support in his view. He believed that if additional bolts were not installed, the roof would have fallen in. His testimony and documentation are fully supported by the miners' representative and are sufficient to establish a violation in this case.

The Commission has recently restated its test for determining whether a violation constitues an "unwarrantable failure to comply." In affirming Ziegler Coal Company, 7 IBMA 280, 1 FMSHRC 1518 (1977), it held:

> ...an unwarrantable failure to comply may be proved by a showing that the violative condition or practice was not corrected or

> remedied, prior to the issuance of a citation or order, because of indifference, willful intent, or a serious lack of reasonable care.

United States Steel Corp., 3 FMSRHC 1424, 1434 (1984).

The Secretary argues that the inspector correctly issued the order in this case because indifference or a serious lack of due diligence or reasonable care was demonstrated by a number of actions attributable to the operator.

The boom hole was cut the day before, at the end of the midnight shift. After the boom hole was cut, only the top of the cavity was rebolted. There is evidence that the reason that additional bolts were not provided on the brows was the fact that the roof bolters could not get the roof bolting machine around the corners of the boom hole and under the two exposed brows. There was debris left in the area from the cutting of the boom hole. The belts were down at the time and the materials could not be cleared out until the next shift. In the meantime, the bolters came in to support the roof and could only get to the center of the boom hole. Inspector Workman stated that statements to this effect were made to him by Henry Paul at the time the violation was cited and by Mike Layman at a later date. These men were section foremen at the time. Mr. Layman stated that his crew would not have been able to get the roof bolting machine around the corners because of material left from the boom hole and that he may have told Inspector Workman that.

The foremen and roof bolters knew or should have known that additional bolts were needed closer to the edge of the brow. As discussed earlier, the fact that this is an established mining practice was clearly shown by the evidence. The action of the roof bolters who came to the area to abate the violation demonstrated that they knew that the bolts should be as close to the edge as possible. They placed additional bolts within one foot of the edge. When asked by Inspector Workman why they put the additional bolts there, they stated that is where they should have been. The foreman in charge of the crew at the time that the boom hole was cut should have observed the work and made sure the roof was rebolted and supported adequately. The fact that debris hampered additional bolting did not justify leaving the job incomplete. The failure to take further action demonstrated a serious lack of reasonable care.

In addition, the violative condition should have been observed during any one of the required examinations of the

area after the boom hole was cut. This area is required to be examined during pre-shift and on-shift examinations. The examiners should have seen the inadequate bolting pattern and exposed areas of roof. Roof falls are the primary cause of fatalities and injuries and examiners should be trained to look for roof conditions that are unsafe or potentially unsafe. The failure to observe and take action in this case amounts to a serious lack of reasonable care.

These facts amply support the Secretary's claim that this violation existed due to a lack of due diligence or reasonable care on the part of the company.

For these reasons, I find that the allegation of an unwarrantable violation is supported by the evidence.

In order to establish a "significant and substantial" finding, it must be shown that:

> ...based upon the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature.

National Gypsum, 3 FMSHRC 822 at 825, 2 FMSHRC at 1203 (1981).

The safety hazard contributed to by this violation was a roof fall. Two of the brows had unsupported areas of approximately 15-1/2' x 2-1/2'. Both of these areas presented a danger of roof fall in the opinions of the inspector and Mr. Antock.

The inspector testified that it was his opinion that these unsupported areas could reasonably be expected to move and fall given the slate roof's weight and history of instability. Mr. Antock agreed. Both of these men, as well as the company's witnesses, were aware of roof falls and injuries at this mine. Mr. Merrified confirmed that there were at least six injuries from roof fall accidents between July 1985 and the time of the hearing. In addition, this particular area was a travelway and was being prepared to become a belt transfer point. This area would have become highly traveled while it was being set up, making the likelihood of injury greater.

In the event of a roof fall in this area, it was reasonably likely that there would be serious injuries. Inspector Workman testified that if either of the unsupported brows fell, there could be fatalities and other serious injuries.

As a general matter, roof support is of foremost concern inasmuch as roof falls frequently result in serious injuries to miners. In Secretary of Labor v. Consolidation Coal Company, 3 FMSHC 1187, 1190 (1984), the Commission acknowledged the Congressional concern with the serious and frequent injuries which result from roof falls:

> A prime motive in enactment of the 1969 Coal Act was to '[i]mprove health and safety conditions and practices at underground coal mines' in order to prevent death and serious physical harm. One of the problems that greatly concerned Congress was the high fatality and injury rate due to roof falls. The legislative history is replete with references to roof falls as the prime cause of the fatalities in underground mines. [Citations and footnotes omitted.]

Fatality statistics reveal that during the first three months of 1986, there have been eleven roof fall fatalities in underground coal mines in the United States. Four of those deaths have been in West Virginia. Current Report, BNA MSHR p. 457 (April 16, 1986). In 1982 through 1985, there were 37, 23, 34 and 18 fatalities, respectively, due to roof and rib falls. Roof falls are the leading cause of coal mine deaths. Current Report, BNA MSHR p. 141 (January 25, 1984); p. 316 (January 9, 1985), p. 305 (January 8, 1986). In 1981, roof falls in underground coal mines resulted in 37 fatalities, 778 nonfatal injuries involving lost workdays and 116 nonfatal injuries involving no lost workdays. Current Report, BNA MSHR p. 111-112 (July 28, 1982). These statistics establish that more miners die or are injured as a result of roof falls than any other type of accident including ignitions and explosions. Thus, Inspector Workman's concern that miners could be injured in a roof fall was well-founded. The Review Commission emphasized in National Gypsum that the inspector's "independent judgment is an important element in making 'significant and substantial' findings which should not be circumvented." 3 FMSHRC at 825-826. The inspector's conclusions in this case were based on his observations of the roof itself, the surrounding area, his knowledge of the mine and the number of employees who would have occasion to be in the area.

I find that Inspector Workman made a careful assessment of the conditions he observed and reasonably concluded that the violation cited was "significant and substantial."

WEVA 86-48-R and WEVA 86-102

At the hearing and in prehearing exchanges, the parties stipulated that the violation of 30 CFR § 75.200 charged in Order 2706704 occurred, that it was of such a nature as could significantly and substantially contribute to the cause and effect of a mine safety hazard, and that it was based on an underlying citation properly issued under § 104(d)(1) of the Act. The only remaining issue is whether the violation was caused by an "unwarrantable failure" to comply.

The violation was obvious and very dangerous. A large piece of slate roof was loose, gapping down and could have fallen at any time. The loose piece of slate roof was approximately five feet long, thirty inches wide and four inches thick. A gap of one-half to one inch existed between the roof and loose rock. The condition was visible when approaching from either direction on the supply track. In light of the size, weight and looseness of the piece of slate, there could have been a roof fall at any time resulting in serious or fatal injuries.

This specific area along the supply track was required to be examined by a certified person during pre-shift and on-shift examinations.

The Secretary contends that the violative condition was allowed to develop into a very dangerous situation without being reported during examinations of the area. The Secretary submits that the fact that this obvious condition in a regularly used travelway went unreported and uncorrected amounts to a lack of due diligence, indifference or serious lack of reasonble care and is sufficient grounds for a finding of unwarrantability. The company contends that the condition occurred suddenly sometime between the time of the last examination and Inspector Workman's arrival in the area.

Both Inspector Workman and Mr. Antock testified that it was very unlikely that the roof could have gotten into this condition in the three to four hours since the last preshift examination. Based on their mining experience and familiarity with the top in this mine, it was their opinion that movement of such a large and heavy piece of rock in a short period of time would have meant a major fall throughout the area. It was

their opinion, based on their observations of the area that day, that the rock had moved gradually over a period of time and did not develop suddenly since the pre-shift examination of this area at 2:20 p.m.

In addition, both Inspector Workman and Mr. Antock stated that this area of the supply track is frequently traveled by crew members on their way to and from the supply truck during each shift.

Therefore, the Secretary argues that the facts amply support the allegation that this violation existed due to a lack of due diligence or reasonable care on the part of the operator.

Inspector Workman testified that:

> Well, as I started to say a little bit ago, our guidelines say that if there are foremen who are in the area, then we are required if we find a violation like this to charge unwarrantable failure, and reasonably believe that the foreman should have known this condition existed or a condition and practice that exists throughout the area, conditions left unabated. [June 19 Tr., p. 2511.]

Because Section Foreman Jim Chiater and Longwall Foreman Fitzhugh were on the section, Inspector Workman believed they "should have known" of the cited condition. However, they testified that they checked the preshift report, which did not indicate a roof hazard, and did not see this area until after the order was issued.

The crew on the shift on which the order was issued did not walk through the cited roof area, but traveled in another entry to get to the dinner hole and later to get to the face. No one on the crew saw the cited area before the order was issued.

The gap in the loose slate, about one-half to one inch wide, contained no rock dust, indicating that the slate did not loosen over a substantial period of time.

I find that there is no direct or objective evidence supporting the allegation of an unwarrantable failure by

Respondent. The Secretary has not met his burden of proving the allegation of an "unwarrantable" violation by a preponderance of the evidence.

Considering all the criteria for assessing a penalty, I find that penalty of $25 is appropriate for this violation.

WEVA 86-49-R and WEVA 86-71

Citation 2706709 alleges a violation of 30 CFR § 1722(a) for the failure to guard exposed moving machine parts of a fluid coupler.

The regulation provides:

> Gears; sprockets; chains; drive, head, tail, and takeup pulleys, flywheels; couplings; shafts; sawblades; fan inlets; and similar exposed moving machine parts which may be contacted by persons, and which may cause injury to persons shall be guarded.

The fluid coupler has moving parts and is subject to the requirements of § 1722(a). There was guarding around most of the fluid coupler, but a small opening exposed moving parts.

The size of the unguarded opening, its location and the speed of the moving parts, combined with the potential for tripping in this area, substantiate the inspector's finding that it was reasonably likely that someone would fall and lose fingers. I conclude that there was a violation, and that it was significant and substantial. Considering all the criteria for assessing a penalty, I find that a penalty of $157 is appropriate for this violation.

WEVA 86-154 and WEVA 86-264

The operator contends that the degree of slope between the edge of the power center and high wall was no greater than an acceptable slope for refuse piles, and was actually purposely constructed to meet the guidelines for the construction of refuse piles in 30 C.F.R. § 77.215(h). However, refuse piles that miners are permitted to walk on do not end in a sharp highwall dropping vertically into an open pit. The slope in this case was muddy, slippery and not safe to walk on. The danger of slipping and continuing to slide to and over the highwall required a guard rail or barrier under 30 C.F.R. § 77.205

The violation constituted an unwarrantable failure to comply with the requirements of 30 C.F.R. § 77.205 in that the failure to provide a safe walkway around the power center at the time it was set up demonstrates a serious lack of care. In addition, the fact that this area had been examined during each shift every day that the power center had been in this location and that the foreman was working in this immediate area amounts to indifference or a serious lack of reasonable case. United States Steel Corp., 3 MSHA 1424, 1434 (1984).

The violation was of such a nature as could significantly and substantially contribute to the cause and effect of a slipping accident.

WEVA 86-8-R and WEVA 86-75

The operator violated 30 C.F.R. § 75.503 by its failure to maintain the five horsepower Flygt pump in permissible condition. The operator concedes that the power input cable did not extend completely through the packing gland into the control box and therefore the pump was not in permissible condition.

The violation constituted an unwarrantable failure to comply with the requirements of 30 C.F.R. § 75.503 in that the failure to install and hang the box properly demonstrates indifference or a serious lack of care. The manner in which the box was hung was unusual and put strain on the cable which caused it to pull farther out of the packing gland.

Furthemore, the failure to observe that the cable was pulled out of the box during at least the weekly permissibility examination demonstrates a serious lack of care. The manner in which the box was hung and the exposed colored leads should have been observed during examinations of the area.

The violation was of such a nature as could significantly and substantially contribute to the cause and effect of a mine fire or explosion.

Considering all the criteria for assessing a penalty, I find that a penalty of $500 is appropriate for this violation.

GENERAL FACTORS

Southern Ohio Coal Company is a large operator with a history of a substantial number of violations within the

24-month period before the first inspection involved in these proceedings. It made a timely and good faith effort to abate each violation found herein, after the violation was cited by the inspector.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction in these proceedings.

2. Respondent violated the safety standard as alleged in each of the following citations and orders: Citation 2564615; Citation 2706709; Citation 2705729; Citation 2557039; Order 2564943; Order 2705721; Order 2564613; and Order 2706772.

3. With the exception of the allegation of "unwarrantable," Respondent violated the safety standard as alleged in Order 2706704.

ORDER

WHEREFORE IT IS ORDERED that:

1. In WEVA 86-30, Respondent shall pay the approved civil penalty of $600 (settlement).

2. In WEVA 86-42, Respondent shall pay the approved civil penalty of $157 (settlement).

3. Based upon the approved settlement to vacate the citation in WEVA 86-51, that proceeding is DISMISSED.

4. In WEVA 86-11-R and WEVA 86-75, Respondent shall pay the approved civil penalty of $400 (settlement).

5. In WEVA 86-38-R and WEVA 86-102, Respondent shall pay the approved civil penalty of $550 (settlement).

6. In WEVA 86-36-R and its related penalty case, WEVA 86-54, Citation 2564615 is AFFIRMED and Respondent shall pay the ASSESSED penalty of $157.

7. In WEVA 86-49-R and the related penalty case, WEVA 86-71, Citation 2706709 is AFFIRMED and the Respondent shall pay the ASSESSED penalty of $157.

8. In WEVA 86-47-R and the related penalty case, WEVA 86-71, based upon the bench decision at the hearing, Citation 2705729 is VACATED and the Petition for Civil Penalty is DISMISSED.

9. In WEVA 86-49-R and WEVA 86-11-R and their related penalty case, WEVA 86-75, Order 2557039 is AFFIRMED and Respondent shall pay the ASSESSED civil penalty of $500; Order 2564943 is AFFIRMED and Respondent shall pay the ASSESSED civil penalty of $400.

10. In WEVA 86-38-R and WEVA 86-48-R and their related penalty case, WEVA 86-102, Order 2705721 is AFFIRMED and Respondent shall pay the ASSESSED penalty of $550; Order 2706704 is MODIFIED to delete "unwarrantable" and as modified is AFFIRMED and Respondent shall pay the ASSESSED civil penalty of $25; Order 2564613 is AFFIRMED and Respondent shall pay the ASSESSED civil penalty of $1,000.

12. In WEVA 86-8-R and its related penalty case, WEVA 86-75, Citation 2557039 is AFFIRMED, and Respondent shall pay the assessed civil penalty of $500.

13. In WEVA 154-R and its related civil penalty case, WEVA 86-264, Order 2706772 is AFFIRMED and Respondent shall pay the ASSESSED civil penalty of $500.

12. All payments of the civil penalties ordered above shall be made within 30 days of this Order.

William Fauver

William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 30, 1986

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING
	:	Docket No. SE 86-23-M
	:	A.C. No. 09-00265-05506
v.	:	
	:	Junction City Mine
BROWN BROTHERS SAND COMPANY, Respondent	:	

ORDER

By order issued on December 2, 1986, I scheduled this case for a hearing in Macon, Georgia, on January 27, 1987, and the parties will be informed of the precise hearing location in advance of the commencement of the hearing. The hearing is a continuation of a previously recessed hearing, and concerns an alleged violation of mandatory safety standard 30 C.F.R. § 56.9807, as stated in a section 104(d)(2) Order No. 2521411, issued by MSHA Inspector Steve C. Manis on September 4, 1985. The inspector issued the order after determining that an automatic back-up warning device on a 644C John Deere front-end loader was inoperable. The violation was abated after the respondent repaired the warning device, and the order has since been terminated.

By letter dated December 10, 1986, respondent's President Carl Brown, asks whether I intend to visit the mine or whether I will permit him to subpoena MSHA Special Investigator Robert Everett for testimony at the hearing.

With respect to any mine visit, the respondent's request for a mine visit IS DENIED. The alleged violation in this case has been abated and the order has been terminated. Under the circumstances, I cannot conclude that a mine visit will assist me in the adjudication of the alleged violation in question or the other pending alleged violations.

With regard to the respondent's request that Inspector Everett be subpoenaed to testify, I take note of the fact that by order issued on September 8, 1986, MSHA's motion for the quashing of a subpoena served on Mr. Everett was granted. The

basis for the ruling was stated in the order and it was further explained in detail to the respondent during the course of the hearing on September 15, 1986. Inspector Everett did not issue the order which is the subject of the instant alleged violation and scheduled hearing. He conducted a special investigation to determine whether or not a section 110(c) proceeding should be instituted by MSHA against the respondent for the alleged violation. That decision was pending at the time of the initial hearing, and for the respondent's own protection against self-incrimination in any possible 110(c) proceeding, no testimony or evidence was taken with respect to the order issued by Inspector Manis.

By letter dated October 8, 1986, and in response to my inquiry concerning the status of MSHA's pending 110(c) determination, MSHA's counsel advised me that MSHA determined that a section 110(c) proceeding was not appropriate and no such proceeding would be initiated. Under the circumstances, I find no basis for requiring the attendance of Special Investigator Everett for testimony at the scheduled hearing on January 27, 1987, and I cannot conclude that his testimony would be relevant or material to any adjudication of the order issued by Inspector Manis. Accordingly, the respondent's request that Mr. Everett be subpoenaed IS DENIED.

Attached is a copy of Mr. Brown's letter of December 10, 1986.

George A. Koutras
Administrative Law Judge

Attachment

Distribution:

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